1986

Telecommunications Resellers of Utah v. Public Services Commission of Utah, Brent H. Cameron, Chairman; James M. Byrne, Commissioner; Brian T. Stewart, Commissioner : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

860400, 860124, 860285

TELECOMMUNICATIONS RESELLERS OF UTAH, Petitioner, vs. PUBLIC SERVICE COMMISSION OF UTAH; BRENT H. CAMERON, Chairman; JAMES M. BYRNE, Commissioner; BRIAN T. STEWART, Commissioner, Respondents.	Case Nos. 860124, 860285 and 860400
TEL-AMERICA OF SALT LAKE CITY, INC., Petitioner, vs. PUBLIC SERVICE COMMISSION OF UTAH; BRENT H. CAMERON, Chairman; JAMES M. BYRNE, Commissioner; BRIAN T. STEWART, Commissioner, Respondents.	Priority No. 9

BRIEF OF RESPONDENTS
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY
UTAH INDEPENDENT EXCHANGE CARRIERS,
CONTINENTAL TELEPHONE COMPANY, AND
UTAH DIVISION OF PUBLIC UTILITIES, DEPARTMENT OF BUSINESS REGULATION

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LIST OF ALL PARTIES
TO THE PUBLIC SERVICE COMMISSION PROCEEDING

Utah Division of Public Utilities, Department of Business Regulation
Committee of Consumer Services
The Mountain States Telephone and Telegraph Company
Utah Independent Exchange Carriers, an association
Continental Telephone Company
Telecommunications Resellers of Utah, an association
AT&T Communications of the Mountain States
MCI Telecommunications Corp.
GTE-Sprint Communications Corp.
Mobile Telephone, Inc.
Mobile Telephone of Southern Utah, Inc.
Beehive Telephone Co.
Union Telephone Co.
South Central Telephone Ass'n
Emery County Farmers Union Telephone Ass'n
Central Utah Telephone, Inc.
Kamas-Woodland Telephone Co.
Uintah Basin Telephone Ass'n
Utah-Wyoming Telephone Co.
Skyline Telephone Co.
Manti Telephone Co.
Navajo Communications
Brigham Young University
American Express Co.

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The Utah Supreme Court has jurisdiction to review these consolidated actions pursuant to Utah Code Ann. § 54-7-16 (1987).

The case arose out of a generic proceeding initiated by the Public Service Commission of Utah (the "Commission") in response to a petition by the Utah Division of Public Utilities (the "Division"). The petition addressed several issues relating to the provision of long distance telephone service in Utah, including whether to permit competition for such service, and if so, under what terms and conditions. The proceeding resulted in a Report and Order by the Commission dated October 29, 1985 (see Appendix 2, Exhibit A), which established a task force to study certain unresolved issues, disallowed competition by facility-based interexchange carriers, authorized WATS[1] resellers to apply for authority to resell intrastate "Feature Group" services, and approved access charge tariffs for such services (hereinafter referred to as "Utah Access Tariffs"). Telecommunication Resellers of Utah ("TRU"), an association of non-facility-based vendors of long distance services, appealed from that order in Case No. 860124.

Case No. 860285, which arose out of the same generic proceeding, was filed by Tel-America of Salt Lake City, Inc.

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1. WATS is an acronym for Wide Area Telecommunications Service. It is a bulk rated, discounted long distance service offered by telephone companies in Utah pursuant to intrastate tariffs approved by the Commission.

("Tel-America")[2] to challenge an order of the Commission which clarified the effective date of the October 29, 1985 Report and Order.

Case No. 860400 is an appeal by Tel-America from several orders which were ancillary to the generic proceeding, in particular an order dated June 24, 1986 denying Tel-America's petition to reopen the generic proceeding, on the ground that the Commission had failed to comply with the Utah Administrative Rulemaking Act, Utah Code Ann. §§ 63-46a-1 et seq.

STATEMENT OF ISSUES

1. Is the Commission's Report and Order of October 29, 1985 sufficiently detailed to permit judicial review?

2. Did the Commission act arbitrarily and capriciously in finding that the Utah Access Tariffs are just and reasonable, especially where Petitioners were illegally using interstate access service to complete intrastate calls for their customers?

3. What was the effective date of the Report and Order issued by the Commission October 29, 1985, and did the filing of TRU's petition for review and rehearing suspend the effective date?

4. Was the Commission required to comply with the Utah Administrative Rulemaking Act in this generic proceeding, and if so, did Petitioners suffer any prejudice from any failure to do so, where they had actual notice and actively participated in the

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2. Although Tel-America was notified of the commencement of the generic proceeding, it did not appear formally therein until after the issuance of the October 29, 1985 Report and Order. Tel-America's president was the principal witness for TRU during the hearings.

proceeding?

5. If the Utah Access Tariffs were set aside, what rates would Petitioners be required to pay for intrastate services?

DETERMINATIVE STATUTES AND REGULATIONS

Utah Code Ann. § 54-3-1 (1986)

Utah Code Ann. § 54-3-3 (1986)

Utah Code Ann. § 54-7-1 (1986)

Utah Code Ann. § 54-7-12(4) (1986)

Utah Code Ann. § 54-7-15 (1986)

Utah Code Ann. § 63-46a-3(4)(a) (1986)

Rule 18.3, Public Service Commission of Utah -- Rules of Practice and Procedure Governing Formal Proceedings. (Rule A67-05-01).

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COMMISSION

The Mountain States Telephone and Telegraph Company ("Mountain Bell"), the Utah Independent Exchange Carriers ("UIEC"), and Continental Telephone Company (hereinafter referred to collectively as "Local Carriers") have identical interests in this proceeding.[3] The Division, which is an agency of the State

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3. Mountain Bell and Continental are certificated local exchange carriers in Utah. The UIEC is an association of the following certificated local exchange carriers: Central Utah Telephone, Inc., South Central Telephone Ass'n, Inc., Kamas-Woodland Telephone Co., Utah-Wyoming Telephone Co., Uintah Basin Telephone Ass'n, Skyline Telephone Co., Beehive Telephone Co., Emery County Farmers' Union Telephone Ass'n, Inc., Manti Telephone Co. and Navajo Communication. Access tariffs for all of the Local Carriers were established in this proceeding and are challenged by this appeal. While such tariffs are not all identical, their differences are irrelevant for purposes of this appeal. Therefore, all such tariffs will be jointly referred to as the "Utah Access Tariffs."

of Utah whose statutory duty is to represent the general public interest in matters relating to public utilities, also joins in this Brief and fully supports its analysis and conclusions.

The Local Carriers accept Petitioners' (hereinafter "Resellers") statement of the Nature of the Case, except to deny that the Commission exceeded its authority in establishing the Utah Access Tariffs.

II. STATEMENT OF FACTS

The Local Carriers accept Resellers' Statement of Facts in general. The Judicial and Regulatory Background Section is generally correct, but is largely irrelevant to the specific issues in this proceeding. However, certain aspects of Resellers' recitation of the facts, not only in their Statement of Facts but throughout their brief, are misleading. There are also serious omissions of material facts. The Local Carriers, therefore, offer the following clarifications, corrections and additions to the facts recited by Resellers.

A. ACCESS SERVICES PROVIDE THE CUSTOMERS OF LONG DISTANCE PROVIDERS THE ABILITY TO ORIGINATE AND COMPLETE CALLS.

One aspect of the growth of competition in the telecommunication industry has been the proliferation of providers of long distance services. Along with the growth has come the need for a method of assuring that customers of such providers can originate and complete long distance calls. To do so, such customers need access to the switching facilities of their long distance provider as well as access, through the local exchange network, to the party they are calling. Local carriers,

who provide the originating and terminating access to such providers, obviously need a mechanism to be compensated for providing the access; hence the need for access tariffs.

Long distance carriers are often categorized as facilities-based or non-facilities based. A facilities-based provider is one that has its own switching and transport facilities. A non-facilities-based provider has only its own switching facilities, and purchases transport services from a facilities-based provider.

B. TRU WAS NOT CONCERNED WITH COSTS DURING THE HEARING.

Resellers' Statement of Facts mischaracterizes the position taken by TRU at the hearing. Throughout their Brief, the Resellers imply that their major concern at the hearing was the lack of Utah-specific cost data. However, the testimony of Jerry Dyer, the President of Tel-America and spokesman for TRU, demonstrates that TRU's primary concern was not the lack of cost data, but rather the proposal not to discount intrastate Feature Group A ("FGA") and Feature Group B ("FGB")[4] rates, as the Federal Communications Commission ("FCC") had done in setting interstate access rates. Indeed, Mr. Dyer testified that the "purpose of my direct and rebuttal testimony is to demonstrate the justification for a discount on Feature Group A and B (FG-A/B) consistent with existing FCC tariffs." (R. 4338,

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4. Although the Resellers challenged the Local Carriers' proposal not to discount both FGA and FGB, the primary focus was on FGA. Since the issues as to both services are identical, further discussion in this Brief shall refer only to FGA. (See Resellers' Brief at 10-11 for a discussion of the different Feature Group services).

emphasis added) In referring to some exceptions to the FCC tariff proposed by the Local Carriers (most notably the proposal not to discount FGA and FGB), Mr. Dyer stated:

> We believe our testimony does show why these areas should not be made a part of the intrastate tariff but should mirror the FCC tariff.

(R. 4329; emphasis in the original). Thus, while TRU made some reference to the lack of cost data (R. 4333), its primary goal in the hearings was not to invalidate the whole tariff, but rather to convince the Commission to adopt the discounted FCC tariff rates as the Utah intrastate rates[5], notwithstanding the lack of Utah-specific incremental cost data even for those rates (R. 1376, 1383). TRU took this position despite Mr. Dyer's inability to quantify the extra cost to Resellers of the alleged inferior access (R. 1328), despite his admission that the FCC discount was not totally cost related, and despite the fact that he had no information to indicate what cost difference there was, if any, between FGA and FGC (the non-discounted interstate access rate applied to AT&T) (R. 1381). Indeed, the record made it clear that the FCC's 55% discount for interstate FGA was not based on costs, but rather was implemented by the FCC to promote competi-

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5. Almost the entire post-hearing Brief of TRU was devoted to arguing for implementation of a tariff with the 55% discount (R. 2419-24). TRU argued strongly that the discount should be allowed so that resellers could be competitive (R. 2425-26).

tion in interstate long distance service (R. 1381-83).[6]

C. RESELLERS KNOWINGLY USED INTERSTATE SERVICES ILLEGALLY TO COMPLETE INTRASTATE CALLS.

Resellers' statement of facts on page 13 of its Brief is far less than forthright. For example, the Brief states:

> Prior to the adoption of the Utah Access Tariff, resellers' customers were purportedly placing intra-state, intra-LATA calls over the interstate system.

(Resellers' Brief at 13, emphasis added). Resellers characterized this use of interstate services as "arguably not permitted by the resellers' Certificates . . . " and indicated that "[c]ustomers were thus allegedly bypassing the authorized intra-LATA WATS tariff . . . . " (Id., emphasis added) These statements convey two totally incorrect impressions:

1. That the record was unclear whether Resellers were using interstate access services to complete intrastate calls; and

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6. In its interstate access charge docket, the FCC made it clear that cost was not its motivating factor in ordering a discount for FGA. Referring to FGA, the FCC stated:

> It is not clear, however, that this inferior level of interconnection is any cheaper to provide. Cost-based pricing would appear to require that all carriers pay their full cost regardless of any quality differences.

In the Matter of MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241, 286, ¶151 (FCC Docket 78-72, released February 28, 1983). In the same order, the FCC explicitly concluded that it was ordering the rate differential for the purpose of promoting competition. Id. at 289, ¶¶ 163-64. In a later Erratum Order issued in the same docket, 97 FCC 2d 834, 858, (FCC Docket 78-72, released February 15, 1984), ¶74, the FCC indicated that the discount at the 55% level had been adopted to prevent a distortion in "the competitive marketplace in interstate telecommunications." (Emphasis added). Cost had nothing to do with the FCC's decision.

2. That their customers were the ones who made the choice to use an interstate service for an intrastate call.

On cross-examination, Resellers' own witness, Mr. Dyer, quoted the certificate that Tel-America had received from the Commission:

> Therefore, it is hereby ordered that Tel-America of Salt Lake City, Inc., be and is issued Certificate of Convenience and Necessity Number 2140 to provide the public generally any and all public utility WATS telecommunication services on a resale basis within the State of Utah.[7]

(R. 1371, emphasis added). Mr. Dyer acknowledged that the intrastate WATS service offered by Mountain Bell is the "only current intrastate tariff that exists." (R. 1342) He agreed that the certificates granted to Tel-America and to other resellers could not be interpreted to authorize the resale of feature group services (R. 1333-34) and that there was no intrastate feature group line available at that time. (R. 1371-72) He agreed that the development of an intrastate feature group service was "the purpose of this proceeding." (R. 1372)

On the question whether resellers were complying with their Certificates and reselling only intrastate WATS, Mr. Dyer openly acknowledged that ENFIA[8] and FGA lines were interstate services (R. 1334) and that all or virtually all resellers in Utah had used interstate access services (first ENFIA lines and later interstate feature group lines) to complete intrastate calls:

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7. The certificates of other resellers were similar in limiting resale to WATS service. (R. 1331, 1333, 1344).

8. ENFIA stands for Exchange Network Facilities for Interstate Access. It was an interstate service that predated and was replaced by the interstate access tariff.

Q. On an industry wide basis, are resellers using Feature Group A and Feature Group D lines to complete intrastate calls?

A. A & D?

Q. Yes.

A. Yes, remembering that the ENFIA line is converted to Feature Group A's.

. . . .

Q. Are all of the resellers using Feature Group A lines to complete intrastate calls?

A. I don't know if I can say all. I believe that most of them are.

(R. 1337, 1338; see also R. 1333-34, 1343) Mr. Dyer acknowledged that resellers had moved from intrastate WATS lines to interstate FGA lines (R. 1343, 1379). The reason is all too clear: Mr. Dyer testified that an FGA line is the "functional equivalent . . . of an intrastate WATS line only at substantially lower rates." (R. 1370-71)[9] Finally, Mr. Dyer acknowledged that through these activities, resellers were operating in violation of their Certificates (R. 1333, 1344). Such activities are also a violation of the Commission order authorizing them to engage in

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9. Timothy Young, a Mountain Bell witness, testified that an intrastate WATS line and an FGA line are "the same," the only difference being that they have merely been "relabeled and repriced." He presented an exhibit showing schematically that WATS service and FGA, when used in a resale application, are identical (R. 3621-22). Mr. Young also presented an exhibit showing that intrastate WATS rates were substantially higher than the non-discounted intrastate FGA rates that were adopted by the Commission (R. 3619).

the resale of intrastate service.[10]

It is thus undisputed that, in order to increase their profit margins, resellers had consciously and intentionally subscribed to services tariffed by the FCC for interstate calling, for use by their customers to complete intrastate calls.

To portray these conclusive facts as "purported" or "arguable" or "alleged" is a distortion of the record. To also claim that the problem was being caused by the customers of resellers is also a distortion of the record. It was the resellers who ordered the services from the Local Carriers, not their customers.

D. THE IMPROPER USE OF INTERSTATE ACCESS SERVICES FOR THE COMPLETION OF INTRASTATE CALLS HARMS UTAH INTRASTATE RATEPAYERS.

Regulation for telephone companies in the United States is split between the interstate jurisdiction (which is regulated by the FCC) and the intrastate jurisdiction (which is regulated by

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10. On April 14, 1983, the Commission issued its Order in Case No. 82-999-05 et al (a copy is attached hereto as Addendum 2, Exhibit B). In that Order, the Commission authorized resellers to engage in the resale of intrastate WATS service. A careful reading of that Order makes it clear that the only services the Commission was authorizing resellers to resell for intrastate calling were intrastate services, most notably WATS. (See Addendum 2, Exhibit B at 3, 7, 9, 16). Throughout the Order, the resellers were referred to as "WATS resellers." (Id. at 22-23). Indeed, paragraph 7 of the Order requires Mountain Bell to file new tariffs with the Commission specifically allowing the resale of intrastate WATS service. (Id. at 24) There is not a single reference in the order to the use by resellers of interstate services to complete intrastate calls.

state commissions). Under this scheme, revenues and costs relating to interstate services are posted to the interstate books through a complicated separation process. Any revenue shortfall in the interstate jurisdiction is made up through increased interstate rates. By the same token, the costs of providing intrastate services and the revenues from such services are posted to the intrastate books. To the extent a revenue shortfall exists in the intrastate jurisdiction, it is made up by an increase in intrastate rate levels (R. 266-67, 1499).

Several Mountain Bell witnesses pointed out the consequence of providing intrastate services pursuant to an interstate tariff: the costs and revenues of the service are booked to the interstate jurisdiction even though the calls are intrastate (R. 264-66, 325, 498, 1873). The Division's expert witness, Cary Hinton, explained that, as a consequence, the proposed intrastate access tariff was needed because it

> will adequately insure that revenues from access services subscribed to by interexchange carriers for intrastate usage will properly be accounted as intrastate, and not as interstate revenues.

(R. 1457). He further concluded that improper booking

> results in a reduction of what should be rightfully identified as intrastate revenues and that therefore, places an increased strain on other intrastate services in order for Mountain Bell to meet its intrastate revenue requirement.

(R. 1499, emphasis added). The TRU representative, Mr. Dyer, acknowledged that, if the scenario discussed above were true, it would be a "matter of legitimate concern" to the Commission, but that how revenues are booked "doesn't matter to the resellers."

(R. 1373). No witness disputed the evidence relating to the effect of improper booking on intrastate ratepayers.

E. THE EVIDENCE DEMONSTRATED THAT IT WAS ESSENTIAL THAT A NEW ACCESS TARIFF BE PLACED INTO EFFECT.

The record of the hearing before the Commission demonstrates a variety of compelling reasons why an intrastate tariff needed to be implemented without delay.

First and foremost was the fact that intrastate calls were being completed over interstate facilities, resulting in an adverse impact on Utah intrastate ratepayers. That alone is more than sufficient justification for the Commission to implement the Utah Access Tariffs without Utah specific cost data.

Second, the Utah Access Tariffs were necessary so that Local Carriers could begin offering a variety of services, among them special access services, billing and collection services, and miscellaneous services (R. 3321-24). While the Resellers' overriding concern is with rate levels for switched access (i.e., Feature Groups A, B, C and D), those rates are only a very small portion of the Utah Access Tariffs that are more than 400 pages long. Indeed, of the twelve major sections of the Utah Access Tariffs, Switched Access represents only one section. The other eleven sections deal in large part with services unrelated to feature group services (R. 3330-32). It was essential that a tariff be approved so that Local Carriers could offer these services on an intrastate basis.

Third, aside from the rate levels for switched access, it was necessary to define the terms and conditions of the service since

the bulk bill tariff, which applied only to AT&T, did nothing to define the terms and conditions of the specific elements of the variety of services offered (R. 2338-39, 3165).[11]

F. COST EVIDENCE BASED ON A NEW METHODOLOGY WAS REASONABLY UNAVAILABLE, BUT OTHER COST EVIDENCE WAS PRESENTED.

Resellers have emphasized at length that Local Carriers did not present Utah-specific cost data at the hearings. That does not mean, however, that the rate levels approved by the Commission are totally lacking a cost basis. Thomas Garcia, a Mountain Bell witness, pointed out that Utah-specific Mountain Bell cost data were unavailable because they were to be based on a methodology still in development (R. 84-85). He testified that they would be "bottom up" or incremental costs (R. 82).[12] Prior to divestiture (which took place on January 1, 1984) there was no need for such data; thus, early 1984 was the first opportunity for Mountain Bell to develop the methodologies, which required a "special study effort." (R. 87)

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11. The Bulk Billing Tariff went into effect on January 1, 1984, coincident with divestiture. It billed AT&T a set amount on a monthly basis (R. 3218-20). Its purpose was not to serve as a definitive access tariff. It applied only to AT&T and was designed so that the Local Carriers could be compensated for AT&T's traffic between the Utah LATA and the approximately 400 customers in Utah who are not part of the Utah LATA (Id. R. 4101).

12. "Bottom-up" costs relate directly to the provision of a particular service and do not include an allocation of non-direct overhead (R. 82). "Top-down" costs include not only direct costs of providing a service, but also allocations of non-direct overhead. (Id.)

The fact that these costs were unavailable and thus not presented at the hearing does not obviate the fact that Utah-specific fully allocated costs were provided to the FCC and were considered by the FCC in developing the interstate rates which Mountain Bell proposed to mirror (R. 82). Lloyd Tanner, another Mountain Bell witness, testified that Mountain Bell anticipated that "the costs in Utah specifically will be something close to what has been used in the interstate jurisdiction." (R. 306)[13] Mr. Hinton, the Division's expert witness, analyzed the Utah costs submitted to the FCC and concluded it was unlikely that there was a significant differential between national average costs and Utah costs (R. 1670). He testified that:

> **A.** In the cost-support information that has been filed by Mountain Bell in comparison with the national average - and this is for NTS costs, not for traffic-sensitive costs - Mountain Bell has been, at least on a percentage basis, has been documented by the FCC staff and by NECA as being approximate to the national average. That's for Mountain Bell, not for the independents. That gives us one assurance that the NTS costs are approximate to the interstate average.
>
> **Q.** Is that just Mountain Bell's Utah data or is that Mountain Bell system data?
>
> **A.** That's Mountain Bell Utah data. Mountain Bell, as do all carriers that operate in multiple states, filed cost support data with NECA, . . . on a study area basis which breaks down to roughly state boundaries.

(R. 1671). Thus, while Mr. Hinton acknowledged that the planned incremental cost studies had not been done for Utah, he did

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13. The Commission found that an interstate access line is identical to an intrastate access line (R. 2720). The costs, therefore, should be identical.

testify that Utah costs submitted to the FCC were close to the national average. No one challenged these conclusions at the hearing or sought introduction of the underlying data supporting them.

G. THE INTRASTATE ACCESS CHARGE DOES NOT RESULT IN A RATE INCREASE

At various points throughout their brief, Resellers characterize the implementation of the new tariff as a rate increase. This characterization is incorrect.

Prior to implementation of the tariff, the only intrastate offering similar to access service was intrastate WATS.[14] Resellers' Certificate specified that they would only resell WATS service (R. 1331, 1333, 1344 and 1371). FGA rates under the access tariff, even at non-discounted levels, are substantially less than WATS rates (R. 3619). When viewed from the perspective of intrastate rates, the Utah Access Tariffs thus represent, as a practical matter, a large rate decrease to Resellers. Technically, there was neither a rate increase nor a decrease, since the access tariffs introduced a service that was not previously offered in Utah. Hence, there was no rate increase.[15]

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14. The bulk bill arrangement applied only to the small amount of intrastate inter-LATA traffic carried by AT&T. There was no intrastate access service (other than WATS) available to other carriers (R. 247, 3218-20).

15. The "increase" spoken of by Resellers resulted from cessation of the illegal practice of providing intrastate service out of an interstate tariff.

H. REVENUES FROM THE NEW ACCESS SERVICES WERE CONSIDERED IN DETERMINING MOUNTAIN BELL'S OVERALL RATE OF RETURN.

Resellers argue that the rates in the Utah Access Tariffs are not just and reasonable since the Commission made no findings as to the impact on Local Carriers' intrastate rate of return. While the Local Carriers will argue later that such a finding is totally unnecessary, it is clear that the anticipated revenues from intrastate access services were included in calculating Mountain Bell's overall rate of return.

The Order approving the Utah Access Tariffs was entered on October 29, 1985. The tariffs became effective on December 1, 1985. Less than a month later, on December 31, 1985, the Commission entered its Report and Order in Case No. 85-049-02, the 1985 Mountain Bell general rate case. (Pertinent portions of the Order are attached hereto in Addendum 2). The Order demonstrates that the new revenues from intrastate access services were included for purposes of determining the appropriate levels of intrastate earnings for Mountain Bell. Finding of Fact No. 10 states:

> The Commission issued its Report and Order in Case No. 83-999-11, Access Charges, during this rate case. The Division proposed an adjustment to the revenue requirement of $2,325,000 in order to account for additional revenue from access tariffs. The Company accepted the adjustment. The Commission finds that the adjustment should be adopted.

(Addendum 2, Exhibit C, at 59-60). Appendix A to the Order shows a $2.325 million offset for Mountain Bell's intrastate revenue award to reflect the intrastate access revenues. It is thus clear that these new access revenues were taken into account and that Mountain Bell did not, by virtue of such tariffs, earn an

excessive rate of return.[16] No appeal was taken from the Report and Order in the Mountain Bell 1985 general rate case.

SUMMARY OF THE ARGUMENT

1. The Commission's 54 page Report and Order, taken as a whole, is sufficiently detailed to permit the Court to determine the factual and policy bases for the Utah Access Tariffs. The bases for the Commission's actions were: (a) that Resellers were in violation of the Commission's previous orders that restricted them to resale of intrastate WATS service; (b) that intrastate competion for long distance service already existed between Local Carriers and resellers; (c) that an access tariff was needed to assure that revenues for intrastate services were properly posted to intrastate books rather than to interstate books, and to provide resellers a legitimate means of obtaining access service for intrastate use; (d) that state policy did not require the Commission to encourage intrastate competition at the expense of reasonably affordable service to Utah citizens; (e) that state policy did not require discounts to purchasers of access services in order to encourage competition; and (f) that, therefore, the rates established in the Utah Access Tariffs, which mirrored FCC rates for identical interstate access service, were fair and reasonable.

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16. If the Utah Access Tariff rated FGA on a discounted basis as the Resellers proposed, the revenue offset in the 1985 rate case would obviously have been less. Thus, those lost revenues would have to have been made up by increasing local rate levels.

2. There was ample evidence to support each of the factual and policy bases for the Utah Access Tariffs. A finding that a rate for a single, new service is just and reasonable does not require evidence of costs and/or rate of return for that service, especially when the methodology to determine such costs had not been developed. In any event, there was evidence that some Utah-specific cost data had been considered by expert witnesses who supported the Utah Access Tariffs. Furthermore, the anticipated revenue from access charges was incorporated into Mountain Bell's general rate case, so that Mountain Bell's overall earnings would not exceed its authorized rate of return.

3. The Report and Order, while setting a target implementation date for the Utah Access Tariffs, did not expressly state an effective date. Thus, it became effective either on the date it was issued (such being the intent of the Commission), or twenty (20) days after service under the Commission Rules. In either case, TRU's Petition for Review or Rehearing was not filed more than ten days before the effective date, and thus did not automatically stay the effective date of the Report and Order.

4. The Commission was not required to comply with the procedural requirements of the Administrative Rule Making Act because the Act exempts compliance where a procedure is already described in a statute. Title 54, and the Commission's rules adopted pursuant thereto, describe the procedure for instituting a new service or changing rates, thus qualifying for exemption from the Rule Making Act. Even if the Act applied, however,

Resellers suffered no prejudice from any failure to comply with it, since they (and all other affected parties) received notice of the proceeding, had an opportunity to be heard, and Resellers did appear and participated extensively in the hearings.

5. The Court may affirm or set aside the Utah Access Tariffs in question, but may not modify them. If the tariffs were set aside, Resellers would have to pay WATS rates for the intrastate long distance service they received under the Utah Access Tariffs, because WATS is the only other legitimate, tariffed offering of bulk intrastate long distance service, it is functionally equivalent to access services, and it is the only long distance service Resellers are otherwise authorized to resell.

ARGUMENT

I. THE COMMISSION'S FINDINGS WERE SUFFICIENTLY DETAILED TO PERMIT JUDICIAL REVIEW

Resellers argue that the Utah Access Tariffs must be set aside because the Report and Order does not contain sufficiently detailed findings of fact to permit judicial review. This argument is incorrect for two reasons. First, it misinterprets the essential holdings of the authorities cited and thus enunciates a legal standard not supported by the cases. Second, it ignores major portions of the Report and Order.

A. THE CASES CITED BY RESELLERS SUPPORT THE REVIEWABILITY OF THE COMMISSION'S ORDER.

Resellers rely upon Mountain States Legal Foundation v. Utah Public Service Commission, 636 P.2d 1047 (Utah 1981), and Milne

Truck Lines, Inc. v. Public Service Commission of Utah, 720 P.2d 1373 (Utah 1986), as authority for their argument that the Report and Order must be reversed because it does not contain sufficiently detailed findings to permit judicial review. A careful analysis of the cases reveals that the Order fits within their principles.

In Mountain States Legal Foundation, the Court reviewed a Commission order approving a proposal of Utah Power & Light Company ("UP&L") to establish senior citizens as a subclass within the class of residential customers. The basis for the classification was that senior citizens have lower incomes and use less electricity on average than other residential ratepayers. The Commission made findings on these matters based upon substantial evidence. Id. at 1058. The Court reversed the order, not because there were no findings, but because there was no rational connection between the findings of the Commission and its conclusion that senior citizens were entitled to a preferential rate. The Court also noted that the Commission failed to explain "the relationship between the need for a senior citizen rate and the Commission's rate making policies." Id. The Court discussed possible findings the Commission could have made which might have justified its conclusion, but concluded that:

> it is not for this Court to "supply a reasoned basis for the agency's action that the agency has not given . . . ." [citation omitted]; nor are we authorized to make findings not made by the Commission.

Id.

In Milne Truck Lines, the Court reviewed a Commission order denying a certificate to Milne because Milne had not proved inadequacy of existing service or need for future service. The Court reversed on the ground that the Commission had applied the wrong legal standard, not because of deficiencies in the findings. Id. at 1377-80. In an effort to avoid further problems on remand, the Court also observed that the Commission had failed to make subsidiary findings necessary to support certain of its ultimate findings, had made a finding contrary to undisputed evidence, had failed to make any findings at all in certain areas critical to its analysis. Id. 1378-79.

In both Mountain States Legal Foundation and Milne, the Court held that the Commission's findings did not provide a rational basis for its orders. The Court also observed in both cases that the Commission had failed to make findings that would have been logically essential to conclusions reached. In Mountain States Legal Foundation, the Court also emphasized that rates for individual customer classes ought to be based upon an articulated ratemaking policy.

The situation presented by the approval of the Utah Access Tariffs is different. The Commission's finding that the Utah Access Tariffs are just and reasonable was supported by rational and substantial evidence referenced in the Order and by a clearly articulated ratemaking policy not to encourage competition for intrastate long distance service.

Resellers point primarily to only one omitted finding of fact which they regard as essential, namely, the Utah-specific cost justification for the Utah Access Tariff. The problem with Resellers' argument is that a finding on cost justification is not required to establish a valid rate for a particular service. (See Point II, infra.) This Order clearly falls within the standard identified in Mountain States Legal Foundation and Milne Truck Lines and is thus legally reviewable.

B. RESELLERS IGNORE SUBSTANTIAL PORTIONS OF THE REPORT AND ORDER, EXALTING FORM OVER SUBSTANCE.

Based upon Mountain States Legal Foundation and Milne Truck Lines, the Report and Order contains sufficient findings and analysis to permit the Court to determine that the Commission's order rationally follows from the evidence presented and is based on an articulated ratemaking policy to avoid competition that would divert revenues from the intrastate jurisdiction, creating further pressures to increase local exchange rates.

The Report and Order reviewed the evidence presented by the parties on the Utah Access Tariffs in some detail for 17 pages. It reviewed evidence presented on the desirability of competition in intrastate long distance services for an additional 15 pages. Resellers correctly observe that the Commission did not in these sections of the Report and Order state which evidence was the basis for its ultimate finding that the Utah Access Tariffs was just and reasonable. However, the Commission's "Findings of Fact and Conclusions of Law" make clear which evidence the Commission found credible and persuasive.

Resellers wish the Court to ignore 32 pages of Commission analysis of the evidence and the manifest inferences from it because the Commission failed either to include it in the portion of the Report and Order denominated "Findings of Fact and Conclusions of Law" or to state at the end of each paragraph whether it accepted or rejected the evidence. This argument exalts form over substance. The portion of the Report and Order denominated "Findings of Fact and Conclusions of Law" comprised only ten and one-half pages of a 54 page order. Obviously, the Commission did not base its order entirely upon the ultimate facts set forth in that section of the Report and Order or it would not have found it necessary to review the evidence at such length elsewhere.

In any event, the "Findings of Fact and Conclusions of Law" articulate at least three additional bases for adopting the Utah Access Tariffs even independent of the analysis of the evidence contained elsewhere in the Report and Order. First, the Commission found that intrastate FGA service was identical to interstate FGA service for which the FCC had already developed a cost supported rate (R. 2720). Second, the Commission found that it could not yet completely determine the effect of intrastate toll competition on local carriers (R. 2714, 2722), but that the incomplete evidence available cast doubt on the soundness of encouraging competition at the expense of reasonably priced local service. Therefore, it did not wish to encourage competition through a substantial discount for FGA service (R. 2719). Third, the Commission found that the Local Carriers were already

experiencing competition from resellers (R. 2715)[17], and that the resellers were acquiring such services in violation of prior Commission orders (R. 2720, 2724). In these circumstances, the Commission had the choice of either prohibiting resellers from using access services illegally (a practical impossibility), requiring them to pay WATS rates, or establishing intrastate access tariffs to permit the service to be acquired legally. By approving the Utah Access Tariffs, the Commission chose the least damaging of these alternatives to Resellers.

Given the extensive evidence analyzed in the Report and Order and the other bases for sustaining the Order, it is apparent that if the Court reads the Report and Order as a whole rather than focusing on Resellers' formalistic arguments, it will find it sufficient for judicial review and will, based on the extensive evidence, affirm it.

II. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A FINDING THAT THE RATES ARE JUST AND REASONABLE

Resellers' principal argument is that the Commission could not find the Utah Access Tariffs just and reasonable because no Utah-specific costs were available. This argument focuses on the lack of substantial evidence of Utah-specific costs of providing

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17. The evidence was overwhelming that competition in the intrastate long distance market was substantial and growing rapidly (R. 2910-16, 3799-3951, 3988-4095). Mr. Garcia, for example, cited a July 1984 study showing that 9 percent of residential customers, 18 percent of single line business customers, 44 percent of business customers with two to six lines, and 49 percent of business customers with seven lines or more use carriers other than Mountain Bell for completing intrastate long distance calls (R. 2911).

access service and of the rate of return to be earned under the Utah Access Tariff. This argument is incorrect for three reasons. First, it applies the wrong standard of review. Second, particular rates, as opposed to the entire body of rates and charges, need not be cost-justified, so long as they are based on rational criteria. This is particularly true where the rate is for a new service and the cost data are reasonably unavailable. Third, some Utah cost data and other cost based evidence were available and had been considered by experts who testified in favor of the Utah Access Tariffs.

A. THE CORRECT STANDARD OF REVIEW REQUIRES THE COURT TO AFFIRM THE ORDER IF IT FALLS WITHIN THE OUTER LIMITS OF REASONABLENESS.

The central issue in this case arises out of Resellers' argument that the Commission acted arbitrarily and capriciously, because the access rates approved in its Report and Order were allegedly not supported by sufficiently detailed findings of fact. In essence, Resellers claim that the tariff rates are not just and reasonable, as required by Utah Code Ann. § 54-3-1 (1986).

The correct scope of judicial review of Commission orders was comprehensively explained in Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983) ("Wexpro II"). Under that case, the standard of review for the issues raised by Resellers is an intermediate one, in which the Court gives considerable weight to the Commission's findings, but reserves the right to determine whether they "fall within the outer limits of reasonableness as measured by the statutory

language, purpose and policy." Id. at 611. In this regard, the Court stated:

> The test of rationality may be simply a matter of logic or completeness, such as when the question is whether the Commission's findings of facts support its conclusion. Similarly, the Commission's "selection of a particular course of action as a means toward achieving a known policy goal can be examined for rationality . . . ."
>
> When the decision being reviewed represents the agency's weighing of competing values to select a particular goal . . . or its application of its findings of facts to a finding or conclusion on the "ultimate facts" in the case, judicial review necessarily involves an independent judgment of the reasonableness of the agency decision. . . . Thus, reasonableness must be determined with reference to specific terms of the underlying legislation, interpreted in light of its evident purpose as revealed in the legislative history and in light of the public policy sought to be served.
>
> . . . .
>
> Considerations of policy are primarily the responsibility of the Commission. It is well settled that this Court cannot substitute its judgment for that of the Commission.

Id. Since the principal issue in this case is whether the Utah Access Tariff rates are just and reasonable, this Court should give considerable weight to the Commission's finding that the rates are indeed just and reasonable, and should affirm that decision because it falls well within the bounds of reasonableness, as the following discussion will demonstrate.

B. RATES CHARGED FOR INDIVIDUAL SERVICES NEED NOT BE COST-JUSTIFIED TO BE FOUND JUST AND REASONABLE.

Even assuming the Utah Access Tariffs were totally without cost support, an assumption rebutted below, the Commission's finding that they were just and reasonable is not arbitrary and capricious. Individual rates for particular services or customer

classifications can be and often are based on factors other than cost.

Section 54-3-1 of the Utah Code provides that public utilities have an obligation to see that any charges made to ratepayers are "just and reasonable." It continues:

> The scope of definition "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customers, and on the well-being of the State of Utah; methods of reducing wide periodic variations in demand of such products, commodities, or services, and means of encouraging conservation of resources and energy.

Utah Code Ann. § 54-3-1 (1986) (emphasis added).

In Mountain States Legal Foundation v. Utah Public Service Commission, 636 P.2d 1047 (1981), the Court faced the question whether each of the standards set forth in Section 54-3-1 must be considered in determining whether a rate charged to one group of users is preferential. Cost-of-service data were not considered in setting the senior citizen rate. The Court said:

> [T]he Legislature has specifically rejected cost of service as the sole criterion for determining whether a rate is just and reasonable as "to each category of customers," although that standard is recognized as one among several others to be evaluated.

Id. at 1054.

Earlier in Mountain States, the Court reviewed some essentials of spreading the revenue requirement of a public utility among its services or customer classes. The Court said:

> Whether cost of service, value of service, or other criteria are used, either alone or in conjunction with each other, classifications of persons must be on the basis of similar -- but not identical characteristics. . . . Moreover, no matter what classifications may be established, the disciplines of accounting and economics are not so precise, or so unified on cost allocation theories or the proper theoretical foundations for ratemaking generally, as to agree on all the

relevant factors and standards to be considered in arriving at rates . . . acknowledged to be equitable.

Id. at 1053.

The Court reviewed other authorities and quoted with approval the following from Garfield and Lovejoy, Public Utility Economics 143 (Prentice-Hall, Inc. 1964):

> It is a generally accepted principle of public utility rate making that differences in the conditions of demand, as among the respective customer classes, indicate that each class has a different capacity and willingness to bear charges. Accordingly, with reference to value-of-service factors, rates are made so as to distribute the approved company-wide cost of service in relation to the capacity and willingness of the customer groups to bear such costs. More specifically, each class bears the identifiable costs that can be associated with its service plus the portion of the joint costs that its demand characteristics indicate it can bear, while continuing to consume a satisfactory quantity of service. In addition, the operation of the value-of-service principle in utility rate making extends to the earning of different rates of profit from different classes of customers or service, within the framework of the over-all return approved under regulation.

Id. at 1054 n.3.

Thus, the Court has expressly recognized that so long as the overall rates of a public utilty are cost-justified, the individual rates for particular services or customer classes need not be cost-justified.

Mountain States cites several cases which agree with the principle. Other cases have also agreed. For example, in Caldwell v. City of Abilene, 260 S.W.2d 712 (Tex. Civ. App. 1953), the Texas court rejected the argument that any difference in rates must be based on cost. The court recognized that rate levels may also be set by examining such factors as

> the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter

which presents a substantial difference as a ground for distinction.

Id. at 714 (Emphasis added).

The rationale of these cases is consistent with the well recognized precedent that whether rates are just and reasonable "is by no means dependent on the procedure followed by the ratemaking body . . . ." Application of Hawaiian Telephone Co., 689 P.2d 741, 748 (Hawaii 1984). "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end." Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) (emphasis added). The reasonableness of utility rates should not be determined according to a fixed formula but rather, it is a fact question left to the sound discretion of the Commission. In Re Hawaii Electric Light Co., 594 P.2d 612, 620 (Hawaii 1984).

Indeed, for seventy to eighty years, the use of cost studies to justify rate allocations in telephone utility regulation was rare. Historically, telephone utilities were not required to itemize and allocate the costs associated with individual services. Any such allocation was considered to compound the already complex ratemaking process, given the multitiude of services provided. For example, in Mountain States Telephone and Telegraph Company v. New Mexico State Corporation Commission, 563 P.2d 588, 600 (N.M. 1977), the New Mexico Supreme Court said: "Allocation of the costs of construction and maintenance of a single telephone pole among the four thousand different services exemplifies this problem."

It was also an accepted fact prior to divestiture that rates for various services were not cost based. For example, it has been widely accepted by most public utility commissions that long distance rates subsidize local calling rates and business rates subsidize residential rates. Id. at 600-601. The principal reason for this lack of cost justification for rate differentials was that such justification was considered irrelevant given the public policy to have universal telephone service. Id.

The value-of-service principle has been specifically recognized as outweighing the cost-of-service principle in evaluating various levels of service for telephone utilities. The Wisconsin Public Service Commission has stated that:

> the value of the service may be entitled to more weight than an estimate of the cost of service which necessarily involves many allocations on a more or less arbitrary basis. This has consistently been recognized by both utility managements and by Commissions as applying notably to differentials in rates for various classes of telephone service. It must be remembered that telephone service involves communication between two persons and if the opportunities for talking with the desired persons are limited, the service becomes less valuable.

Re Wisconsin Telephone Co., 22 PUR 220, 221 (Wis. P.S.C. 1937). See also, Allied Chemical Corp. v. Georgia Power Co., 224 S.E.2d 396, 398-400 (Ga. 1976).

Resellers' argument that the lack of Utah-specific cost data renders the Commission's approval of the Utah Access Tariff arbitrary and capricious is even less persuasive in a circumstance where a Utah-specific cost study based upon a new methodology was unavailable. The intrastate cost information could not be generated because the methodology for obtaining this data was then still in development (R. 84-85). Rather than

waiting for proper cost studies, however, Resellers were perfectly willing to obtain access services instead of WATS services, so long as they did not have to pay more than the interstate rates.

In similar situations, the Kentucky and Michigan Public Service Commissions allowed their local carriers to set intrastate access rates without the benefit of specific cost data because the data was unavailable. Re Toll and Access Charge Pricing and Toll Settlement Agreements, 65 P.U.R. 4th 234 (Kentucky P.U.C. 1985); Re Michigan Bell Telephone Co., 75 P.U.R. 4th 349 (Mich. P.S.C. 1986). The Michigan Commission said:

> While the commission acknowledges that it would be advantageous to have specific data available to establish the cost justification for access charges, the commission nevertheless does not believe that that data was available at the time these cases were filed.

Id. at 358.

Absence of cost data was also recognized as a valid basis for utilizing other factors to set individual rates in Mountain States Telephone v. New Mexico Corp. Commission, 563 P.2d 588 (N.M. 1977). The Court said:

> In some types of services the cost is reasonably determinable. In others the data has not been available from which accurate costs could be developed.

Id. at 600.

In the absence of available Utah-specific cost data, the mirroring approach used by the Local Carriers to establish intrastate rate levels was not arbitrary or discriminatory. "[O]nly a discrimination that is arbitrary and without a

reasonable fact basis or justification" is considered capricious. Caldwell v. City of Abilene, 26 S.W.2d 712, 715 (Tex.Civ. App. 1953).

C. UTAH COST DATA WERE AVAILABLE AND HAD BEEN CONSIDERED BY AN EXPERT WHO TESTIFIED IN SUPPORT OF THE TARIFF.

The Utah Access Tariffs mirror the interstate access tariff adopted by the FCC. The FCC tariff was based on average, nationwide, fully allocated cost data. Mountain Bell submitted fully allocated access cost information to the National Exchange Carriers Association for a study area that corresponds approximately with the State of Utah. That information was used by the FCC in setting its nationwide interstate access rate. On the basis of such data, the Division's expert witness, Cary Hinton, testified that Mountain Bell's non-traffic sensitive ("NTS") Utah data were approximately those of the national average (R. 1670-71).

Resellers argue that this testimony cannot be the basis for the finding that the Utah Access Tariffs are just and reasonable because the underlying data were not introduced. (Resellers' Br. at 37). Rule 705 of the Utah Rules of Evidence provides that:

> The expert may tesify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

It is apparent from this rule that expert opinion may be based upon underlying data that are not introduced, but that such data should be introduced if requested on cross-examination. Resellers did not seek the data on cross-examination, and

therefore may not object to the fact that they were not introduced. See State v. Hansen, 710 P.2d 182 (Utah 1985); Child v. Child, 8 Utah 2d 261, 332 P.2d 981, 987-88 (1958).

Furthermore, Mountain Bell presented other evidence demonstrating that the Utah Access Tariffs were non-discriminatory. Mr. Garcia presented an exhibit demonstrating that, when one compares non-discounted rates for FGA with Mountain Bell toll rates, the Mountain Bell toll rates produce greater support to NTS costs[18] than do access charges (R. 4414). Based on 1983 actual results, Mountain Bell's toll rates produced 14.3 cents of NTS support per minute of use, while the level of NTS support under the proposed access tariff rates was 10.5 cents per minute of use. Even assuming a toll rate reduction proposed by Mountain Bell, the Mountain Bell toll NTS cost support was still one cent per minute greater than the proposed access charges. Id. The record is clear that users of access services would not be carrying a greater NTS load than is Mountain Bell. Mountain Bell's toll rates had been found just and reasonable in prior general rate cases.[19] If FGA rates produce less contribution to

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18. NTS costs are fixed costs associated primarily with the provision of lines between a customer and that customer's serving central office. Each customer uses one line. The cost of a line does not vary with usage; hence, the costs related to providing such lines are characterized as being non-traffic sensitive. Traditionally, a substantial part of the revenues to cover NTS costs have been derived from toll services.

19. See e.g. the Commission's orders in the following Mountain Bell general rate cases: Case No. 82-049-08 (November 17, 1983, Case No. 83-049-05 (November 30, 1983), Case No. 84-049-01 (April 29, 1985), and Case No. 85-049-02 (December 31, 1985).

NTS costs than Mountain Bell's rates, FGA ratepayers have no basis to complain about discrimination.

Inasmuch as the Utah Access Tariffs mirrored the FCC interstate access tariff and produced a lower contribution to NTS costs than Mountain Bell's previously approved toll rates, it was reasonable for the Commission to conclude that the Utah Access Tariffs were reasonable. Further, it was reasonable for the Commission to assume that the Utah Access Tariff would not be found unjust or unreasonable once the Utah-specific Mountain Bell cost study was completed. Therefore, it is evident that Mountain Bell's proposed rate levels were "supported and justified by a factual basis for classification and by substantial evidence which justifies the charges." Caldwell, 26 S.W.2d at 715.

D. THE RESELLERS' AUTHORITIES DO NOT REQUIRE COST JUSTIFICATION FOR A SINGLE, NEW SERVICE.

Resellers rely on Utah Department of Business Regulation v. Public Service Commission of Utah, 614 P.2d 1242 (Utah 1980), and Utah State Board of Regents v. Utah Public Service Commission, 583 P.2d 609 (Utah 1978), as authority for the proposition that the Commission could not find the Utah Access Tariffs to be just and reasonable in the absence of a Utah-specific cost study and evidence on rate of return. This reliance is misplaced.

The Local Carriers accept as general propositions the two rules referred to in these cases: (i) that a utility has the burden of proof to support a rate increase with substantial evidence and (ii) that just and reasonable rates should allow a utility to recover its operating expenses plus a reasonable

return on its invested capital. However, Business Regulation and Board of Regents are not applicable to the situation here for several reasons.

First, Business Regulation and Board of Regents both involved rate increases. Here, there was a generic hearing to consider whether intrastate toll competition would be allowed on some basis other than WATS resale and, if so, to establish rates for access. This was not a rate increase hearing. Rather, the Utah Access Tariffs are new tariffs for a new service never offered before in Utah. Utah Code Ann. § 54-7-12(4) (1981) provides that:

> Notwithstanding any other provisions of this title, any schedule, classification, practice, or rule, which does not result in any rate increase that is filed with the Commission shall take effect at the expiration of thirty days from the time of filing or within any lesser time the Commission may grant, subject to its authority after a hearing on its own motion or upon complaint to suspend, alter, or modify that schedule, classification, practice or rule. If the Commission suspends a schedule, classification, practice, or rule, a hearing shall be held prior to a final order issued with respect to that action. For purposes of this subsection (4), any schedule, classification, practice, or rule that introduces a service or product not previously offered may not result in a rate increase. (Emphasis added).

Clearly, Business Regulation's requirement that the utility bear the burden of proof to justify a rate increase is not applicable here since a new service by definition does "not result in a rate

increase."[20] Furthermore, in light of the fact that the access rates are substantially less than the rates for WATS service, which is the functional equivalent of access service, it is difficult to understand the Resellers' argument that the access rates represent a rate increase.

Second, Business Regulation and Board of Regents both involved an increase in all rates and charges for all services and customer classes. In short, they involved a general rate increase. In this case, however, there was no general rate increase. The Utah Access Tariffs are applicable to only one type of service and to only one class of customers. While it is fundamental that all of the rates and charges of a public utility taken together must be sufficient to permit the utility to recover its costs of service and a reasonable return on the value of its property devoted to public use (Business Regulation at 1248), it has never been required that rates for each service or for each class of customers be so justified. (See Point II, A, supra.)

It has always been recognized that certain services or customer classes might subsidize other services or customer

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20. Resellers cite Utah Code Ann. § 54-7-12(2) in support of their arguments. That section, however, deals with utility actions that result in a rate increase. Since the Utah Access Tariffs represent a new service, the operative section is Section 54-7-12(4). In its motion to dismiss the appeal, UIEC accepted Resellers' position that the Utah Access Tariffs represented a rate increase. If the Court were to hold such to be the case, UIEC reasserts its argument that Resellers' appeal is moot because the tariffs went into effect automatically 240 days after filing. See Memorandum of Points and Authorities filed by UIEC.

classes in the public interest. Id. In such cases, the rate components when summed must be cost based, but the individual components need not be cost based. If Resellers' argument (that each separate service has to be cost justified and produce no more than the authorized rate of return) were accepted, it would require a massive restructuring of telephone rates, with dramatic increases in local service rates. However, all that is required is that the different rates for particular services or customers must not be unreasonably discriminatory and must be set on some rational basis. Id. The Utah Access Tariffs, based on FCC-approved interstate access costs and producing a lower contribution to NTS costs than Mountain Bell's toll rates, clearly fit within these parameters.

Third, in Business Regulation and Board of Regents, the Court was concerned with a lack of evidence or a refusal to allow evidence of the effect of the rate increases on the utilities' rates of return. Here, that issue was resolved in Mountain Bell's contemporaneous general rate case, in which the new, anticipated revenues from intrastate access services were included in the determination of appropriate levels of intrastate earnings for Mountain Bell.

Fourth, in Business Regulation and Board of Regents, customers were rightfully using a service in a manner authorized by their existing tariffs. The question presented was whether the tariffs ought to be increased. Here, Resellers were using a service they were not authorized to use, and they were paying for the service under a non-applicable tariff that diverted revenues

from Utah which otherwise could have been used to reduce the upward pressure on local basic service rates.

Fifth, no new service was offered in Business Regulation or Board of Regents. When the Commission is establishing rates for a newly authorized service, it may be expected that reliable cost data may not be available and that rates will have to be set based upon other factors. See, Mountain States Legal Foundation and Caldwell, supra. Business Regulation and Board of Regents do not suggest that the Commission cannot set rates for a new service prior to having detailed cost data which may be unavailable. It is likely that such data will take a great deal of time to develop and will become more reliable with actual experience. E.g., American Hoechest Corp. v. Department of Public Utilities, 399 N.E.2d 1, 3-4 (Mass. 1980). The dilemma presented by Resellers' argument is that reliable data may not be available when a new service is offered, but it may be in the public interest to introduce the service immediately. Obviously, a rule requiring cost data before a new service can be introduced would be contrary to the public interest.

Resellers' argument is not only illogical, it is disingenuous. Their real complaint is not with a lack of cost justification, but with the Commission's failure to adopt a 55% discount for FGA, as did the FCC. The irony is that the discounted rate was no more cost-justified than the non-discounted rate. The discount the Resellers seek was rather based upon an FCC policy to promote interstate toll competition. In this case, the Commission did not believe that the evidence indicated that promotion of

intrastate toll competition was in the public interest and, therefore, did not wish to promote it through discounts.

In this case, Mountain Bell provided the Commission with a proposal to mirror FCC-ordered interstate access rates. Inasmuch as intrastate data was reasonably unavailable due to the short time frame since divestiture, Mountain Bell offered testimony supporting its intrastate mirroring proposal as being in accord with the interstate rates then in effect. The expert witness for the Division concurred with this testimony. Mountain Bell further supported the tariff with evidence that it was non-discriminatory. As a result, the Commission based its decision upon consistent factual information. Its decision was just, reasonable, and not arbitrary.

III. THE ORDER WAS NOT SUSPENDED BY FILING OF THE PETITION FOR REVIEW

Resellers argue that the effective date of the Order was suspended under Utah Code Ann. § 54-7-15 from December 1, 1985 (the effective date of the tariffs), until February 6, 1986 (the date of denial of TRU's Petition for Review) because TRU filed a petition for review on November 18, 1985, supposedly more than 10 days before the effective date of the Order.

The flaw in that argument is the erroneous assumption that December 1, 1985 was the effective date of the Order. In fact, while the Order was issued October 29, 1985, it did not expressly state an effective date; therefore, it is reasonable to conclude that it was effective when issued. Alternatively, under Rule

18.3 of the Commission's Rules of practice,[21] the Order became effective 20 days after service, or about November 20, 1985 (R.2727). Thus the Petition for Review was filed less than 10 days before the effective date and hence would not operate to suspend the Order.

Resellers wrongly assume that because the Order established "December 1, 1985, or as soon thereafter as practicable" as the date for implementation of the Utah Access Tariffs, that was the effective date of the Order itself. That conclusion fails to consider that the Order encompassed much more than simply the approval of tariffs. It also established a telecommunications task force, together with a method of organization and a charge to study specific issues relating to competition for long distance services; it denied competition by facility-based interexchange carriers pending the findings and recommendations of the task force; and it allowed all presently certificated WATS resellers to petition the Commission for authority to resell

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21. Rule 18.3 states in pertinent part:

> Effective Date of Order: The order referred to in Section 18.2, shall of its own force, take effect and become operative twenty (20) days after the service thereof, unless otherwise provided in such order, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the Commission.

The Commission's Rules of Practice were completely revised effective January 2, 1987. The new rule 10.5 provides:

> Effective Date--Copies of the Commission's final Report and Order shall be served upon the parties of record. Orders shall be effective the date of issuance unless otherwise provided by statute or in the Order. . . .

feature group services intrastate (which they had already been doing illegally). There is nothing in the language of the Order that would imply the Commission's intention to suspend all of those items until "December 1, 1985 or as soon thereafter as practicable."

Indeed, while it makes sense to allow the Local Carriers the necessary additional time to prepare to implement appropriate tariffs complying with the Report and Order, there was no reason to suspend the other parts of the Order until the tariffs could be implemented. As the Commission explained:

> Delaying the implementation of a tariff does not mean that the order approving it is ineffective until that date. To the contrary, such a date is established because the utility must prepare and file final tariff sheets with the Commission and must make all the internal adjustments and training necessary to implement such tariffs. Thus, significant time and effort are expended prior to the date the tariffs become effective. As such, there is no inconsistency in making an order effective immediately, even though the tariffs approved by such order are not to be implemented until a later date. (R. 2809)

Thus, the effective date of the tariffs cannot be deemed to be the effective date of the Order.

If there were any question as to the Commission's intent, it was laid to rest in the Commission's March 7, 1986 Order, which expressly stated that the Commission intended that the Order be effective upon issuance (R. 2807-08).

Resellers' argument, that the Commission's ability to make an order effective immediately precludes a party from taking advantage of Section 54-7-15, is unpersuasive. Under that argument, no Commission order could become effective for at least 10 days after issuance; yet the statute contains no such

limitation. Under Section 54-7-15, a dissatisfied party has 20 days from the issuance of an order to file a petition for review or rehearing, regardless of the effective date of the order. The only circumstance in which a petition automatically stays the effective date of an order is when the petition is filed more than 10 days before the effective date and is not acted on before the effective date. Thus, the Commission does have the right to preclude a party from obtaining an automatic stay simply by making its order effective less than ten days after issuance. Indeed, Section 54-7-15(1) provides in part:

> An application for review or rehearing shall not excuse any corporation or person from complying with and obeying any order or decision or with any requirement of any order or decision of the Commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except as herein otherwise provided, and except in such cases and upon such terms as the Commission may by order direct.

In summary, the effective date of the Order was October 29, 1985 (the date the Order was issued) at the earliest or November 20, 1985 (20 days after service) at the latest. Since TRU's petition was filed on November 18, 1985, which was not more than 10 days before either date, it could not operate to suspend the effective date.

IV. THE ADMINISTRATIVE RULEMAKING ACT DID NOT APPLY IN THIS PROCEEDING, AND RESELLERS SUFFERED NO PREJUDICE IN ANY EVENT.

Resellers have made a fundamental error in arguing that the Utah Administrative Rulemaking Act (the "Act") applied to this proceeding. The error lies in a mistaken assumption that a generic proceeding by the Commission is necessarily a rulemaking

proceeding. The fact that the case involved multiple issues which affected multiple parties does not alone make it a rulemaking proceeding.

The logical consequence of Resellers' reasoning is that every case in which a utility introduced a new service, or eliminated or modified an existing service, or changed rates for any of its services, would be subject to the procedural requirements of the Act, because a class of subscribers would be affected. Thus, virtually all Commission orders, including all rate case orders and all tariffs, among other things, would have to comply with the Act: they would have to be kept in the rules file at the Commission and be filed with the Office of Administrative Rules; a rule analysis form for each would also have to be prepared and filed with the Office of Administrative Rules; they would have to be published in the State Bulletin; a copy of the forms would have to be mailed to all persons specified in the Act; and, following publication, there would be a 30-day public comment period during which the Commission could be forced to hold a hearing if another state agency, 10 interested persons or an interested association with 10 or more members requested it. Utah Code Ann. §§ 63-46a-4 and -5. Surely, the Legislature did not intend such a result.

Although the Act provides that rulemaking is required when "agency actions affect a class of persons," Utah Code Ann. § 63-46a-3(3)(a), it provides further that rulemaking is not required "when a procedure or standard is already described in statute." Utah Code Ann. § 63-46a-3(4)(a). In the present case,

Title 54 already describes, in much greater detail than the Administrative Rulemaking Act, the procedures to be followed by a utility to institute a new service or to change rates. E.g., Utah Code Ann. § 54-3-3 (notice required for changes in schedules); § 54-7-12 (procedure for changes or increases in rates); § 54-7-15 (review or rehearing procedure); and §§ 54-7-16 and 17 (appellate procedure).

Section 54-7-1 itself directs the Commission to adopt rules to govern the regulation of public utilities, specifying what provisions to include. The Commission has adopted such rules, which constitute its rules of practice.[22] With such an extensive statutory scheme already established, it is apparent that this procedure is exactly the type excepted from the Act.

The underlying purpose of the Act is to provide due process-like protections of notice and an opportunity to be heard to all persons who might be affected by an agency's actions. In the present case, all of those protections were afforded to the public in general and to Resellers in particular. Notice of the proceeding was published in a newspaper of general circulation (R. 57, 1885), and any person who so desired was allowed to file testimony or participate in the hearings, which extended 11 days.[23] The proceeding itself lasted two years and is still

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22. Section 54-7-1 also provides that "[n]o informality in any hearing, investigation or proceeding ... shall invalidate any order, decision, rule, or regulation made, approved or confirmed by the commission."

23. On November 21, 1984, the day set aside for public witnesses, seven witnesses offered testimony (R. 1209-1317).

going on through the work of the task force.

Tel-America, as well as some 60 other interested parties, received direct written notice of the proceeding from its inception (R. 1889-1892; 1893-1905). Although Resellers were well aware of the nature and process of the generic proceeding, they never complained of the failure to follow all of the steps of the Act until more than seven months after the Report and Order had been issued. Instead, TRU appeared at the hearing and offered extensive testimony through Jerry Dyer, the president of Tel-America (R. 1320-1449; 4301-4347). Thus, there is absolutely no basis for Resellers to argue (and indeed they did not claim) that they suffered any prejudice by reason of a technical failure to follow the Act's procedures (i.e. the failure to file the proposed Report and Order and a "rule analysis form" with the Office of Administrative Rules).

Even assuming the Commission should have followed the detailed requirements of the Act in this case, an action of an administrative agency generally will not be upset because of harmless error which does not prejudice the substantial rights of a party. In Utah Gas Service Co. v. Mountain Fuel Supply Company, 18 Utah 2d 310, 422 P.2d 530 (1967), the petitioner complained about the lateness of the time and the manner of the notice it received, in a proceeding before the Commission in which Mountain Fuel Supply Co. was granted authority to extend a distribution line to Bonanza, Utah. Rejecting the claim because the petitioner had received notice and participated in the proceeding, the Court stated:

> In proceedings before an administrative agency what a party is entitled to is to be treated with fairness: to have the opportunity to prepare and present his case and his contentions with respect thereto; and to have an adjudication in conformity with the law; and the decisions of the Commission will not be overturned because of irregularities of procedure from which there is no substantial prejudice or adverse effect.

Id. at 532 (footnote omitted). See also, Mattingly v. Charnes, 700 P.2d 927, 928 (Colo. App. 1985) ("[O]ne who is notified, appears, and participates in a hearing, cannot later be heard to complain as to the sufficiency of the notice he received."); Grams v. Environmental Quality Council, 730 P.2d 784 (Wyo. 1986).

The case at bar is similar to the cases cited above in that Resellers received notice of the Commission proceeding and participated actively in it. Thus, as to the Resellers, every legitimate purpose of the Act was fulfilled. Therefore, even if this Court were to hold that the Act applied, there should be no reversal, because Resellers were not prejudiced by any failure to comply with the technical provisions of the Act.

Williams v. Public Service Commission, 720 P.2d 773 (Utah 1986), cited by Resellers, is easily distinguishable from the present case. In Williams, the Commission had reversed a long-standing position on assumption of jurisdiction over one-way paging services, not by initiating a generic proceeding, as in the case at bar, but rather by means of a letter to a single entity. In Williams, there was no prior notice to all affected parties, nor any opportunity to appear and offer evidence or comments. In the case at bar, all affected parties received notice and had an opportunity to appear. Furthermore, in this

case there was no reversal of long-standing policy, because the Commission had never before addressed the issues presented in this proceeding.

In summary, there was no reversible error by failing to follow strictly the requirements of the Act, because the Act itself contains an exemption where other procedures are provided by statute, as in this case, and because Resellers suffered absolutely no prejudice.

V. SETTING ASIDE THE ACCESS TARIFF WOULD REQUIRE RESELLERS TO PAY THE HIGHER WATS RATES FOR INTRASTATE LONG DISTANCE SERVICE

The relief prayed for by Resellers is to set aside the Utah Access Tariffs. However, Resellers have already used the services offered by means of those tariffs to complete intrastate calls. Thus, the question arises, if the Access Tariffs were set aside, what would the appropriate rates be for the intrastate long distance services already provided to Resellers?

The FCC tariff clearly does not apply to intrastate activity, and this Court does not have the power to order the Commission to adopt the discounted FCC rate as the rate for Utah intrastate access services. Section 54-7-16 of the Utah Code requires this Court either to affirm or to set aside the order under review, but does not confer authority to modify it. Salt Lake Transfer Co. v. Public Service Commission, 11 Utah 2d 121, 355 P.2d 706, 711 (1960); see also Mountain States Telephone and Telegraph Co. v. Public Service Commission, 107 Utah 502, 155 P.2d 184, 188, reh. denied, 107 Utah 530, 158 P.2d 935 (1945).

Without the Utah Access Tariffs, the only authority for Resellers to provide intrastate long distance services in Utah would be through resale of WATS; in fact, their Certificates of Convenience and Necessity expressly limited them to resale of WATS (R. 1335). Thus, if for any reason the Utah Access Tariffs are set aside, the only rates available to charge Resellers for completion of intrastate calls would be the rates established under the existing WATS tariffs. Those existing rates would have to be applied to intrastate services already furnished by Resellers as well as to services yet to be rendered, until a new intrastate access tariff could be established. Any new tariff could not apply retroactively, since to do so would be to engage in retroactive ratemaking, which is illegal if done by the Commission and certainly far beyond this Court's proper role. See generally, Utah Department of Business Regulation v. Public Service Commission, 720 P.2d 420 (Utah 1986).

Even if the Court were to remand this case to the Commission for further findings of fact, (see, e.g., Milne Truck Lines, Inc. v. Public Service Commission, 720 P.2d 1373 (Utah 1986); Parowan Pumpers Ass'n v. Public Service Commission, 586 P.2d 407 (Utah 1978)), Resellers would not be entitled as a matter of law to a refund of any charges paid under the Utah access tariffs during the pendency of this appeal. Committee of Consumer Services v. Public Service Commission, 638 P.2d 533 (Utah 1981); Utah Code

Ann. § 54-7-17.[24]

The ironic result of the foregoing principles is that if Resellers were entirely successful in their appeal, they would end up paying the higher WATS rates for intrastate access services already used, with no guarantee that any future action by the Commission would afford them the lower rates they desire.

CONCLUSION

The evidence summarized in the Commission's Report and Order establishes not only a rational basis, but a compelling need for adoption of the Utah Access Tariffs. Faced with wholesale violations of the Resellers' limited intrastate authority to resell WATS, and the inevitable adverse effects on Utah ratepayers of allowing Resellers to use interstate access services to complete intrastate calls, the Commission acted reasonably.

Under the circumstances, the Commission should not be prevented from acting simply because Utah-specific costs were not available. The Commission is not required to base its order on evidence of costs and rate of return for a single service among many, but may set rates to serve the public interest. The rates were, in fact, simply a reflection of the Commission's policy decision not to encourage intrastate competition to the same

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24. While Mountain Bell has entered into an agreement with Tel-America regarding security for payment of access charges, neither Continental Telephone Co. nor any member of UIEC has done so, and no stay or suspending bond has been obtained as to them.

extent that the FCC was encouraging interstate competition. It was not error for the Commission to adopt such a policy and to implement it through the rate structure.

The undersigned Respondents respectfully request the Court to affirm the Report and Order.

DATED this 17th day of June, 1987.

MOYLE & DRAPER

By _____
John W. Horsley, Attorney for Continental Telephone Company

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

By _____
Ted D. Smith
Floyd A. Jensen, Its Attorneys

UTAH DIVISION OF PUBLIC UTILITIES

By _____
Michael Ginsberg, Assistant Attorney General

KIRTON, MCCONKIE & BUSHNELL

By _____
James J. Cassity, Attorney for Utah Independent Exchnge Carriers

MAILING CERTIFICATE

I hereby certify that on this 17th day of June, 1987, I caused to be mailed four true and correct copies of the foregoing Respondents' Brief, by first-class mail, postage prepaid, to:

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ADDENDA

ADDENDUM 1 - STATUTORY PROVISIONS:

Section 54-3-1 Utah Code Ann. (1986)

Section 54-3-3 Utah Code Ann. (1986)

Section 54-7-1 Utah Code Ann. (1986)

Section 54-7-12(4) Utah Code Ann. (1986)

Section 54-7-15 Utah Code Ann. (1986)

Section 63-46a-3 Utah Code Ann. (1986)

ADDENDUM 2 - PUBLIC SERVICE COMMISSION ORDERS:

EXHIBIT A - October 29, 1985 Report and Order in Case No. 83-999-11.

EXHIBIT B - April 14, 1983 Report and Order in Case Nos. 82-999-05, 82-999-07, 82-999-08 and 82-999-09.

EXHIBIT C - Portions of the December 31, 1985 Order in Case No. 85-049-02.

ADDENDUM 1

STATUTORY PROVISIONS

Sections 54-3-1 Utah Code Ann. (1986)

All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient, just and reasonable. All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. The scope of definition "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the state of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources and energy.

Section 54-3-3 Utah Code Ann. (1986)

Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, toll, fare, rental, charge, classification or service, or in any privilege or facility, except after thirty days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission, and keeping open for public inspection, new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission for good cause shown may allow changes, without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made, the time when they shall take effect and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreement, or in any rule, regulation or contract relating to or affecting any rate, toll, fare, rental, charge, classification or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission by some character to be designated by the commission immediately preceding or following the item.

Section 54-7-1 Utah Code Ann. (1986)

All hearings, investigations and proceedings shall be governed by this chapter. The commission shall adopt rules pursuant to the Utah Administrative Rulemaking Act to govern the regulation of public utilities. These rules shall include: (a) provisions for the discovery of information, including the confidentiality of information submitted to the commission and sanctions for failure to make discovery; and (b) provisions governing the practices and procedures in hearings, investigations and proceedings of the commission. The rules shall be designed to simplify and expedite proceedings, eliminate unjustifiable expense and delay, and enhance the fairness and effectiveness of the fact finding process. In the conduct of proceedings before the commission the technical rules of evidence need not be applied. No informality in any hearing, investigation or proceeding, or in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission.

Informal resolution, by agreement of the parties, of matters before the commission shall be encouraged. These agreements shall be subject to the approval of the commission and the commission shall give due regard to the interests of the public and other affected persons before issuing orders approving any agreement.

The commission may, at its sole discretion in cases or procedures involving rate increases as defined in § 54-7-12, limit the factors and issues to be considered in the determination of just and reasonable rates.

Section 54-7-12(4) Utah Code Ann. (1986)

(4) (a) Notwithstanding any other provisions of this title, any schedule, classification, practice, or rule which does not result in any rate increase that is filed with the commission shall take effect at the expiration of 30 days from the time of filing or within any lesser time the commission may grant, subject to its authority after a hearing on its own motion or upon complaint to suspend, alter, or modify that schedule, classification, practice, or rule. If the commission suspends a schedule, classification, practice, or rule, a hearing shall be held prior to a final order issued with respect to that action. For purposes of this Subsection (4), any schedule, classification, practice, or rule that introduces a service or product not previously offered may not result in a rate increase.

(b) Notwithstanding any other provision of this title:

(i) Whenever there is filed with the commission by a common carrier any schedule, classification, practice, or rule which does not result in any increase in any rate, fare, toll, rental, or charge, the same

shall go into effect 30 days after the filing with the commission, or at any earlier time the commission may grant, subject to the authority of the commission, after a hearing had on its own motion or upon complaint as provided in this section, to suspend, alter, or modify the same.

(ii) Whenever a common carrier files with the commission a request for an increase in rates, fares, tolls, rentals, or charges based solely upon cost increases to the common carrier of fuel supplied by an independent contractor or independent source of supply, the requested increase shall go into effect ten days after the filing of the request with the commission, or at any earlier time after the filing of the request as the commission may by order permit. The increase shall go into effect only after a showing has been made by the common carrier to the commission that the increase is justified, subject to the authority of the commission, after a hearing had on its own mo

Section 54-7-15 Utah Code Ann. (1986)

Before any party, stockholder, bondholder, or other person pecuniarily interested in the public utility who is dissatisfied with an order or decision of the commission may commence legal action, the aggrieved party or person shall first proceed as provided in this section.

(1) After any order or decision has been made by the commission any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for review or rehearing in respect to any matters determined in said action or proceeding specified in the application. The applicant shall make application to the commission for review or rehearing within 20 days after the issuance date of the order or decision. The application shall set forth specifically the grounds on which the applicant considers such decision or order to be unlawful. No applicant shall in any court urge or rely on any ground not set forth in the application. Any application for review or rehearing made ten days or more before the effective date of the order as to which review or rehearing is sought shall be either granted or denied before such effective date, or the order shall stand suspended until the application is granted or denied. Any application for review or rehearing made within less than ten days before the effective date of the order as to which review or rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application. If any application for review or rehearing is granted without a suspension of the order involved, the commission shall forthwith proceed to dispose of the matter with all dispatch and shall determine the same within 20 days after final submission, and, if such determination is not made within said time, it may be taken by any party to the review or rehearing that the order involved is affirmed. An application for review or rehearing shall not excuse any corporation or person from complying with and obeying any order or decision or with any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except as herein otherwise provided, and except in such cases and upon such terms as the commission may by order direct.

(2) (a) The commission upon receipt of an application for review shall, after review, proceed to grant or deny the application. If the application is granted, the commission shall review the entire record on matters covered in the application and shall affirm, abrogate, change, or modify the original order or decision as it deems proper.

(b) If the application is for rehearing, the commission, after review of the entire record on matters covered in the application, may either grant the application or determine that there is insufficient reason to grant a rehearing, in which event, it shall deny the application, but it may affirm, abrogate, change, or modify its original order or decision as it deems proper. If a rehearing is granted, the commission, after rehearing and after considering all the facts including those arising after the original order or decision, shall affirm, abrogate, change, or modify its original order or decision as it deems proper.

(c) Any order or decision which abrogates, changes, or modifies an original order or decision shall have the same force and effect as an original order or decision. but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

Section 63-46a-3 Utah Code Ann. (1986)

(1) Each agency shall maintain a complete copy of its current rules and make it available to the public for inspection during its regular business hours.

(2) Each agency shall make rules to fulfill the purposes of this chapter.

(3) Rulemaking is required when:

(a) agency actions affect a class of persons;

(b) agency actions affect the operations of another agency; or

(c) statutory or federal mandate requires rules.

(4) Rulemaking is not required when:

(a) a procedure or standard is already described in statute;

(b) agency action affects an individual person, not a class of persons;

(c) agency action applies only to internal agency procedures; or

(d) grammatical or other insignificant rule changes do not affect agency policy or the application or results of agency actions.

(5) Each agency may incorporate by reference applicable federal and professionally recognized uniform code rules, if the agency:

(a) incorporates by reference federal and uniform rules, and all future changes in them, under the procedures of this chapter;

(b) states specifically in its rules which federal and uniform rules are incorporated by reference, and any agency deviation from them; and

(c) maintains complete and current copies of federal and uniform rules incorporated by reference, both at the agency and at the Office of Administrative Rules, available for public inspection.

(6) The state attorney general shall provide agencies any assistance to ensure agency rules are legally sound.

ADDENDUM 2 - PUBLIC SERVICE COMMISSION ORDERS:

EXHIBIT A - October 29, 1985 Report and Order in Case No. 83-999-11.

EXHIBIT B - April 14, 1983 Report and Order in Case Nos. 82-999-05, 82-999-07, 82-999-08 and 82-999-09.

EXHIBIT C - Portions of the December 31, 1985 Order in Case No. 85-049-02.

EXHIBIT A

DOCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation of Access Charges for Intrastate Inter-LATA and Intra-LATA Telephone Services.	)	CASE NO. 83-999-11 REPORT AND ORDER

ISSUED: October 29, 1985

Appearances:

David E. Salisbury Ted D. Smith	For	The Mountain States Telephone and Telegraph Co.
Michael Ginsberg Mark C. Moench Assistant Attorneys General	"	Division of Public Utilities
Brian W. Burnett Assistant Attorney General	"	Committee of Consumer Services
Randy L. Dryer Ruth Baker-Battist	"	MCI Telecommunications Corp.
Stuart L. Poelman Richard C. Ehnert	"	AT&T Communications of the Mountain States
A. Robert Thorup Ann C. Pongracz	"	GTE-Sprint Communication Corp.
Brinton R. Burbidge James J. Cassity	"	Utah Independent Exchange Carriers
John W. Horsley	"	Continental Telephone Co.
Bryan McDougal	"	Telecommunications Resellers of Utah
Kay M. Lewis	"	Mobile Telephone, Inc. and Mobile Telephone of Southern Utah, Inc.

By the Commission:

This matter was heard by the Public Service Commission of Utah (Commission) on November 14-17, 19-21 and December 4-7, 1984 in Salt Lake City, Utah.

I. BACKGROUND OF THE PROCEEDING

This matter was initiated as a generic proceeding in the latter part of 1983. In its Order dated December 21, 1983, the Commission ordered that two bulk-bill tariffs be placed into effect by which Mountain States Telephone and Telegraph Co. (Mountain Bell) and the Utah Independent Exchange Carriers in Utah (UIEC) would bill AT&T Communications for access to complete intrastate inter-LATA calls. The tariffs went into effect on January 1, 1984. The Commission noted in its Order that the bulk-bill arrangement was a short-term solution until more definitive access tariffs could be placed into effect.

Thereafter, by Order dated June 1, 1984, the Commission ordered that this matter proceed to consideration of definitive access services tariffs to replace the bulk-bill arrangement. In addition, the Commission outlined several issues relating to the nature of intrastate intra-LATA competition, and the extent to which it would be allowed in the state of Utah. These issues were:

A. Should the Commission authorize intrastate intra-LATA competition by Specialized Common Carriers (SCC's) for message telecommunication services?

B. What impact would intra-LATA competition by SCC's have on Mountain Bell's, and the independent telephone companies' revenues from message telecommunication services?

C. What revisions to Mountain Bell's intra-LATA message

telecommunication service rates would be required for Mountain Bell to remain competitive with the SCC's?

D. Would the approval of intrastate intra-LATA competition by the SCC's for message telecommunication services require the establishment of intra-LATA carriers access charges? If yes, how should the intra-LATA carriers access charges be structured? How should the intra-state allocation of non-traffic sensitive costs be apportioned between the inter-LATA carriers access charges, intra-LATA carriers access charges, intra-LATA message telecommunication service and wide area telecommunication service rates and the rates for local exchange services?

E. Should Mountain Bell and the independent telephone companies be allowed to provide ancilliary services (billing services, recording services, directory assistance service, security investigative services, and testing services) to SCC's that compete for intra-LATA message telecommunication services?

F. What are Mountain Bell's plans and time schedules to provide equal exchange access to all SCC's for inter-LATA message telecommunication services? When will pre-subscription to the interexchange carriers be initiated by Mountain Bell? Will the equal access connections allow Mountain Bell or the SCC's to prevent the SCC's customers from using their system for intra-

LATA telecommunication services?

G. Should the Commission set a specific intrastate usage limitation for SCC's below which they could continue to operate without a Certificate of Convenience and Necessity and tariffs?

H. What standards should the Commission use to affirm the fitness of an SCC to receive a Certificate of Convenience and Necessity to operate as an intra-LATA carrier? On what basis should the Commission approve rates and tariffs for SCC's providing intra-LATA message telecommunication services? Should the Commission forbear from regulating rates, requiring tariffs or applying any of its existing rules and regulations for an SCC providing intra-LATA message telecommunication services? Should the Commission establish any new regulatory requirements for an SCC providing intra-LATA message telecommunication services?

I. Should SCC's be required to provide ubiquitous intra-LATA message telecommunication services?

J. Should Mountain Bell be designated as the "preference carrier" for intra-LATA message telecommunication services?

K. Should Mountain Bell be designated as the "carrier of last resort" for intra-LATA message telecommunication services?

L. If intra-LATA competition is not authorized, should the Commission require interstate SCC's to install equipment to block intra-LATA message telecommunication service?

The access tariff and intra-LATA competition issues were set for hearing and filing dates for tariffs and testimony were established by the Commission. Hearings commenced on November 13, 1984. Twenty-five witnesses presented testimony to the Commission.

II. POSITIONS OF THE PARTIES

A. Identification of Witnesses

Mountain Bell presented the direct and rebuttal testimonies of Mr. Thomas A. Garcia, Mr. W. Mack Lawrence, Mr. Lloyd I. Tanner, Mr. Timothy F. Young, Mr. Joseph S. Kraemer, Mr. Gerard J. Boschen and Mr. James L. Baker. The Division of Public Utilities (Division) presented the direct testimony of Mr. Cary B. Hinton. Continental Telephone Company of the West (Continental) presented direct and rebuttal testimony of Mr. Paul Montsinger. The Utah Independent Exchange Carriers (UIEC) presented the testimony of Mr. Perry A. Arana. AT&T Communications (AT&T) presented testimony of Dr. Merrill J. Bateman, Mr. W. Lester Johnson, and Mr. James Hansen. Mr. Jackie N. Dukes testified on behalf of Navajo Communications (Navajo). MCI

Telecommunications (MCI) presented the testimony of Mr. Warren L. Liss and Mr. Steven R. Brenner. The Telecommunication Resellers of Utah (TRU) offered direct and rebuttal testimony of Mr. Jerry Dyer. The Committee of Consumer Services (Committee) presented the testimony of Dr. Joseph Ingles. Seven public witnesses testified.

Access Charge Tariffs were filed by Mountain Bell and the Utah Independent Telephone Companies containing proposed rates for connection by interexchange carriers, either through reselling of other telephone services or by interexchange facility carriers, to the local networks. The Tariffs also provided for the billing of interexchange carriers' services and the termination of local service for nonpayment of all amounts billed. The Tariffs proposed by the local exchange carriers mirror the interstate access tariffs in effect at the time, with some exceptions. Mountain Bell's exceptions were as follows: no discount for Feature Groups A and B (FGA & FGB), reporting and auditing, restructure of FGA-FX service to the local calling area, directory assistance, end-user common line charge at this time, and denial of local service for nonpayment of toll charges. The Independent Exchange Carriers exceptions, in addition to those requested by Mountain Bell, delete the requirement of providing certain services when technical restrictions prevent providing the services options, allowing FGA customers access limited to the local access area, and the Billing and Collections mirror the National Exchange Carrier Association (NECA) tariff.

In addition to the tariffs, testimony was received on competition, whether the Commission should limit regulation to facilitate the movement to competitive markets, the threat of by-passing the switched network, universal service, and the cost of providing the interconnect service.

B. Access Charge Tariff

Tariffs for intrastate services were presented by Mountain Bell and the UIEC. These tariffs are to facilitate the interconnection of interexchange carriers from one exchange to another. The differences in the tariffs are due to the abilities of the companies to provide the required connections requested by the interexchange carriers. The tariffs set forth the rates and services that will be offered by the local exchange carriers. These services include Switched Access Services, Special Access Service, Billing and Collection Service, and Miscellaneous Services. Switched Access Services are designated Feature Group A, B, C, and D connections which are similar to the interstate tariffs approved by the Federal Communications Commission (FCC). The Feature Groups are equal to the Exchange Network Facilities for Interstate Access (ENFIA) connections which were used to provide intrastate and interstate toll services. Special Access Services deal with non-switched services which are not available at this time. Billing and Collection Services would allow the local exchange carrier to do the billing and collection for SCC's similar to what is provided to AT&T. This service would include

the right to terminate local service for nonpayment of long distance toll bills since the accounts of the SCC's would be purchased by the local exchange carrier. Miscellaneous Service includes special routing, additional engineering and labor, testing services and any specialized or additional arrangements needed to provide the services in this tariff.

The proposed access services tariff also differed from the interstate tariff in the following areas:

(1) WATS and 800 services are limited to a shared use basis.

(2) The deposit and credit policies contained in the Utah Mountain Bell General Exchange Tariff replace those contained in the interstate tariff; and

(3) Access services would be restricted to interexchange carriers including resellers;

UIEC's intrastate inter-LATA tariffs basically mirror the intrastate inter-LATA and intra-LATA tariffs developed by Mountain Bell except for the tariff sections dealing with Switched Access Services and Billing and Collection Services.

The Division supported, in general, the revisions to the interstate access services tariffs that were proposed by Mountain Bell and by the UIEC.

Testimony of the parties on the access services tariffs issues are as follows:

1. Feature Groups A, B, C & D

No Discounts for Feature Groups A and B. Feature Groups A and B (FGA, FGB) are proposed connections for SCC's and Resellers to receive and complete intrastate inter- or intra-LATA calls over the local network. FGA and FGB are the functional equivalent of intrastate Wide Area Telephone Service (WATS) lines, but at significantly reduced rates.

Mountain Bell testified that FGA, FGB, and FGD are equal to Measured Toll Service (MTS) and WATS as "switched access service" with shared transmission path which transports a call to or from an end-user, within a LATA. The rates for such services from the interstate access tariff depend on the status of equal access within a particular LATA. As equal access becomes available in particular switching offices, carriers subscribing to access services will move from transitional (discounted rate) to non-transitional (full priced) rates for interstate usage. Mountain Bell asserted that the discounts in the interstate federal access tariff for FGA and FGB are not cost-based. The proposed Mountain Bell rate is $730/month/circuit.

The UIEC proposed an additional provision to the Switched Access Services section specifying that options and features described in that section may not be available in all independent company end offices. The UIEC proposed to limit FGA terminations to the local calling area. This would mitigate the potential for revenue loss that would occur if customers chose to replace existing service with FGA.

Continental concurred with UIEC that FGA should be restricted to the local calling area.

MCI presented testimony that there are significant cost differences and competitive disadvantages with regard to the forms of access that are currently available to MCI in the state of Utah. According to MCI, access is inferior because:

(1) FGA and FGB require MCI customers to dial twelve more digits per call than AT&T Communications customers.

(2) MCI suffers significant transmission loss on the FGA (line side access) obtained in the state of Utah, while there is no similar transmission loss in the type of access AT&T Communications and Mountain Bell have for their long distance services.

(3) FGA and FGB services require more expensive interfaces in the MCI switches than the Feature Group C (FGC) interfaces used by AT&T Communications and Mountain Bell. MCI also testified that Mountain Bell does not send answer supervision over FGA which, therefore, requires MCI to provide hardware and software in its switches to simulate such answer supervision.

MCI testified that Mountain Bell's costs to provide FGA and FGB access is significantly lower than the cost to provide FGC access to AT&T and Mountain Bell. MCI concluded that cost differences constitute a justification to support a significant differential or discount access charges for FGA and FGB compared to access charges for FGC and FGD.

The primary thrust of TRU's testimony was to demonstrate justification for a discount on FGA and FGB. In TRU's testimony the discount is justified on a temporary basis because the access to the public switch network provided to resellers is inferior to that provided to Mountain Bell and AT&T Communications. TRU's testimony asserted that the access of resellers is inferior in the following respects:

(1) Lower quality transmission over FGA than provided to AT&T and Mountain Bell,

(2) FGA does not provide Automatic Number Identification (ANI) which requires customers of resellers to enter personal identification numbers of from 5 to 7 digits,

(3) FGA does not provide answer supervision which requires resellers to use sophisticated and expensive software and hardware to detect when customers answer and hang up,

(4) FGA cannot be accessed by customers with rotary phones without special equipment, and

(5) Since reseller customers must dial more numbers to complete calls the resellers are required to invest in more expensive switching equipment than the established carriers.

Mountain Bell's rebuttal testimony to the direct testimony of TRU and MCI made the following points:

(1) Line side switched access services such as FGA, which is used extensively by resellers and SCC's is not inferior to the resellers' present interconnection with

WATS.

(2) Access services represent an economic advantage to resellers even at non-discounted rates to the rates that they would be paying if they were reselling WATS.

(3) Line side interconnection appears to be satisfactory for most resellers for terminating calls even when the superior FGD is available to them.

Mountain Bell further asserted that there is no need for larger, more expensive switching equipment or additional trunks due to the number of digits dialed by resellers' customers and that there is no discernible difference between two (lineside) and four (trunk) wire connections and premium carriers do not always have four wire connections.

MCI, in rebuttal testimony, pointed out the differences from a customer point of view between FGA and FGB as opposed to FGC and FGD. The primary difference is that additional digits must be dialed to obtain access. MCI also pointed out that line side connections afforded through FGA and FGB are inferior, providing only one-half to one-fourth of the signal strength (three to six decibel loss) of other access methods. There are significant differences in switch interfaces between FGA and FGB on the one hand, and FGC and FGD on the other, which require additional investment by carriers and resellers. FGA does not provide answer supervision to the MCI switch, thus requiring additional hardware and software to provide such service.

2. Pricing

Feature Group A and B connections are presently discounted in the interstate tariffs until equal access has been achieved in the Central Office. Mountain Bell proposes non-discounted rates primarily to avoid experiencing adverse revenue impacts as a result of a shift from MTS and WATS to FGA and FGB circuits.

Mountain Bell represented it would receive $54,413 annually from AT&T Communications for intrastate inter-LATA access. The amount of revenue that would be received under the access charge tariffs from resellers and other carriers cannot be estimated at this time because intrastate usage by them is not presently known.

The Division supported the proposals by Mountain Bell and the UIEC to offer FGA and FGB at non-discounted rates.

The Division does not believe it is necessary to adopt a rate structure for feature group connections that gives a significant discount to intrastate interexchange carriers, such as resale carriers, as a means to encourage their competition with either Mountain Bell or AT&T Communications.

TRU testified that if premium non-discounted rates are adopted as proposed by Mountain Bell and others, resellers using FGA access would be forced to charge their customers intrastate toll rates in excess of those charged by established carriers. TRU argued that the shortfall in revenues projected by Mountain Bell would not occur and that, in fact, a net increase in

revenue, even if the full discount is implemented, would occur.

TRU indicated that until equal access is implemented discounts for FGA and FGB are necessary because of their inferiority to FGC and FGD and asserted that failure by the Commission to recognize the need for a discount would be fatal to many Utah-based resellers. TRU disagreed with the Division's characterization of the interstate discounts for FGA and FGB as being primarily to promote competition. They pointed out that the real justifications for transitional pricing for FGA were:

(1) line quality,

(2) competition, and

(3) the provision for going to premium rates at the time when equal access FGD lines do become available.

MCI in rebuttal testimony disagreed with the Division's proposal to place into effect non-discounted rates for FGA and FGB, stating that the service is inferior. Since MCI must compete with a carrier enjoying superior interconnection (Mountain Bell), MCI is placed at a competitive disadvantage. This could be offset by an appropriate discount.

MCI testified that a transitional discount for non-premium FGA and FGB should be part of the Utah intrastate access tariff just as it is part of the interstate tariff. Such a discount would help to bridge the transition from monopoly provision of long distance service to equal access and competition.

Mountain Bell's rebuttal stressed that discounted FGA and FGB services would give pricing incentives to resellers to maintain their present form of interconnection, rather than move to FGD when equal access becomes available.

3. Restricting Feature Group A Foreign Exchange Off-Network Access Line (FGA-FX/ONAL) to the Local Calling Area.

Mountain Bell proposed to restrict FGA-FX/ONAL service to the local calling area as has been traditionally done. The reason for this proposal is to maintain continuity with other foreign exchange services provided by Mountain Bell and other local exchange carriers. This service provides dial tone to an individual subscriber and not a general access line to an inter-exchange carrier.

AT&T opposed the limitation to the local calling area because it is discriminatory and does not allow full use of the connection. Mountain Bell rebutted the presumption that restriction of FGA-FX/ONAL type service would be discriminatory on grounds that the service was traditionally provided in that manner prior to divestiture.

4. Reporting and Auditing

Because Mountain Bell's proposal, if adopted, would result in state rates differing from federal rates for FGA and

FGB, special reporting and auditing procedures would be necessary to assure proper booking of revenues and expenses. Mountain Bell therefore proposed that quarterly reports be filed by subscribers to FGA and FGB lines showing the number of interstate and intrastate minutes of use for the preceding quarter. The minutes-of-use reports would have to be audited by the local exchange carrier so detailed and accurate records and back-up documentation supporting the reports would have to be maintained for one year.

TRU disagreed with the proposed auditing provisions to the extent that they may allow a competitor to have access to proprietary information. TRU indicated a necessity for protection of proprietary information if the auditing provisions are adopted by the Commission.

The Division recommended that carriers be required to report intrastate usage on a quarterly basis, and that the reports be submitted to the local exchange carrier and to the Division. In addition, the Division recommended that any interexchange carrier who failed to file the required reports would have all usage billed as intrastate usage.

5. Billing Services

"Billing and collection services" apply to both switched and special access services and are offered to all interexchange carriers. Under these tariff provisions, Mountain

Bell would perform certain billing functions for interexchange carrier customers, ranging from message detail recording to bill rendering and collections.

Mountain Bell proposed that it be able to deny local service to customers refusing to pay the toll charges billed by Mountain Bell for other carriers. The Company asserted that the inability to terminate service in this circumstance would increase bad debt and result in a greater write-off. The Company would have to purchase the accounts it billed for SCC's and should be allowed the full range of collection action to collect these amounts because the billing process would not allow for a separation of toll charges from local service charges without substantial investment to modify billing procedures.

The UIEC proposed to delete Mountain Bell's billing and collection tariff section and to replace it with the National Exchange Carrier Association ("NECA") interstate billing and collection tariff in order to avoid costly re-programming and administrative expenditures.

Continental supported the proposal that the UIEC and Mountain Bell should be allowed to provide ancillary services such as billing and collection, recording, and directory assistance. These services, under the proposed access services tariff, would be an alternative source of revenue to help keep exchange carriers whole.

The Division recommended that the Commission order Mountain Bell and the UIEC to revise the billing and collection

services provisions by itemizing the charge for customer termination service. The Division indicated that adequate information is not yet available to determine the precise amount that should be itemized for such charges. However, the Division recommended that the Commission order Mountain Bell to prepare this information in association with the proposed tariff revisions. If the Commission decides not to require Mountain Bell to itemize the customer termination service, it should at least require Mountain Bell to increase the rate for billing and collection service to a level which accounts for the value of the customer termination service.

The Committee recommended that Mountain Bell should not be allowed to terminate local exchange service for non-payment of long distance charges billed by Mountain Bell pursuant to its billing and collection tariff.

Mountain Bell's rebuttal testimony addressed issues raised by the Committee and the Division. With regard to issues raised by the Committee, Mountain Bell pointed out that the billing systems of carriers other than AT&T Communications do not require Mountain Bell to terminate local service for nonpayment because it can selectively deny access to customers. With regard to AT&T, however, long distance calling cannot be blocked without prior denial of local exchange service. Mountain Bell further addressed the effect of denial on AT&T's uncollectible rate and the marketing advantages to Mountain Bell in being able to provide billing and collection service. Mountain Bell pointed

out several reasons why the Commission should permit continuation of denial of service and the benefits derived by Mountain Bell customers as a result of such service. Among these were the following:

(1) Ratepayers benefit directly by not having to cover the costs generated by nonpayers. Furthermore, such customers have the convenience of one phone bill for local service and for long distance.

(2) There are distinct advantages to Mountain Bell in being able to operate a single balance due system with denial for nonpayment. Under that situation, Mountain Bell can utilize its current billing system with a minimum of change to provide service to all carriers. This, in effect, turns a cost center and potential stranded investment into a profit center. Furthermore, if Mountain Bell were required to change from a single to a dual or multiple balance due system, the cost would be extensive and would have to be recovered from ratepayers in some manner.

With regard to the testimony of the Division, Mountain Bell indicated that the Division's proposal to require optional denial by carriers who subscribe to Mountain Bell billing services could have a significantly adverse affect on Mountain Bell because Mountain Bell would incur the expense of changing its billing system without assurance that any customer would subscribe to the service. Mountain Bell could conceivably charge customers of its billing and collection services for the ability

to deny. But to charge too much for such a service and to ignore the competitive nature of billing and collection services might force customers to provide billing and collection services themselves or obtain such services elsewhere. This would be detrimental to the Mountain Bell general ratepayer.

6. End-User Common Line Charges

Mountain Bell has not recommended collection of non-traffic sensitive (NTS) costs from end-users in this proceeding even though the Company states that doing so may at some time be necessary to mitigate uneconomic bypass and to ensure that universal service can be maintained. AT&T and MCI support an end-user charge to collect NTS cost and assert that such a charge is proper. Mountain Bell stated that NTS costs should be recovered in access charges in the short-term, but that an orderly transition from carrier recovery to end-user recovery is necessary to prevent bypass and consequent revenue losses. Mountain Bell's position is that these issues should not be considered by the Commission in this proceeding, but at a later date. The Committee and Division testified that no end-user charges for access services should be adopted by the Commission in this proceeding.

7. Time-of-Day Pricing

TRU testified that an equitable access charge tariff would include time-of-day pricing. This would allow resellers and others to take advantage of off-peak rates.

Mountain Bell, however, asserted that access charges priced on a time-of-day basis would not be cost-based. Such prices would favor carriers or resellers whose market is mostly residential customers and would harm carriers whose market is primarily business customers.

8. Blocking

MCI testified that it is impossible to accurately determine the true points of origination and termination of some calls. Because of this, it should not be required to block calls based on their point of entry into the MCI network.

The Division testified that blocking intrastate calls from SCC's would be unreasonably costly and not in the best interest of the general public. The Division stated that it would be more appropriate for technical changes to be made to equipment in order to prevent the use of FGD connections for completion of unauthorized intrastate intra-LATA or inter-LATA calls.

9. Pay Telephones of Interexchange Carriers

The Division recommended that tariffs be revised to add a specific element for the provision of access service to coinless pay telephones owned by intrastate interexchange carriers.

10. Special Access Services

"Special access service" is a dedicated transmission path between an interexchange carrier and an end-user within a LATA. Mountain Bell indicated that an interstate special access service tariff has not been approved by the FCC, but following such approval Mountain Bell would file a revised tariff that would mirror the interstate service arrangements.

Concerning the special access service charges proposed by Mountain Bell, AT&T recommended that the rate levels for such services should be adjusted downward so that they are equivalent to the private line rates applicable to end-users, until such time as Utah-specific costs are developed and rates based on those costs can be established by the Commission. The Division recommended that special access service rates should be approved as proposed by Mountain Bell. TRU removed their objection to this offering after the service had been clarified.

C. Competition

Mountain Bell testified that the telecommunications market is becoming increasingly competitive and that Mountain Bell is vulnerable in such a marketplace because of regulatory restrictions which apply to it but not to competitors. Mountain Bell stated that fair competition is Mountain Bell's goal. Mountain Bell is not seeking immediate deregulation, but it must have greater flexibility in its service offerings and pricing requirements. Mountain Bell recommended that it be permitted to compete effectively and equitably.

Competition currently exists in the intra-LATA long distance market. Mountain Bell presented a description of the technology that makes competition increasingly viable for customers and increasingly difficult for regulators to control. Mountain Bell presented a Utah-specific study indicating that nine percent of residential customers, 18 percent of single-line business customers and 44 percent of two- to six-line business customers use alternative carriers or resellers to complete intrastate toll calls. Also, 49 percent of the seven-or-more-line business customers use alternative carriers, resellers, or a private network to complete intra-LATA intrastate calls. Mountain Bell estimates its market share in the intrastate intra-LATA toll market at approximately 79.6 percent. Further testimony indicated that the primary reason cited by customers for use of alternative suppliers is cost savings and that customers are increasingly choosing alternative suppliers. Its competitors, Mountain Bell asserts, operate under less stringent regulatory conditions than it does. Mountain Bell is subject to greater regulation than its competitors in pricing policies and subsidization requirements, in bookkeeping requirements, and in capital recovery procedures. As a result of regulation, Mountain Bell lacks the flexibility to respond to changes in the market, and, in addition, faces regulatory lag.

Mountain Bell strongly supports allowing competition to exist but insists competitors must face equal conditions. Competition exists in the intra-LATA market and it will continue to grow despite actions the Commission may take to prevent it.

Mountain Bell recommended that intra-LATA competition be permitted and that a transition plan under which interexchange competing services would be deregulated should be formulated by the Commission.

In summary, Mountain Bell recommended that the Commission recognize the reality that competition exists in the marketplace and that the Commission should authorize it, so long as all competitors, including Mountain Bell, are governed by the same regulatory requirements.

UIEC testified that while members of the UIEC are not opposed to toll competition in concept, they feel that very few of the benefits of competition would be realized by subscribers who reside in rural and small urban areas. Benefits from competition would generally accrue to the larger population areas of Utah and not to areas of the state having low density toll routes.

The UIEC stated that over the long term, intrastate competition will become a fact of life. But, an orderly transition to competition should occur. At this time there are aspects of intrastate competition that have not been studied. The SCC's or OCC's must have the burden of showing that competition would be advantageous to Utah subscribers.

It is reasonable, according to UIEC, to anticipate a decrease in MTS revenue as a result of competition for two basic reasons. First, loss of business to competitive carriers would

reduce revenues and secondly, existing toll rates may fall. Any loss of intrastate toll settlements would push local rates up. The UIEC requested that the Commission:

(1) Delay the implementation of intrastate intra-LATA toll competition until sufficient Utah-specific data has been analyzed to determine the impact of competition on Utah subscribers and carriers and to determine whether competition is in the public interest; and

(2) Establish procedures and time periods for the collection of the Utah-specific data necessary to determine whether intrastate intra-LATA toll competition is in the public interest.

Continental indicated that it agreed with UIEC and that it is premature to allow intra-LATA competition in the state of Utah. If the Commission feels that competition is appropriate at this time, the Commission should also consider implementing both a system of access charges and a universal service fund. Continental testified that intra-LATA competition is not appropriate at this time because the impact it may have on the revenue requirements of local exchange and toll carriers is unknown. Also, stranded investment in high cost areas may be caused by the deaveraging of toll rates. Continental testified that the deaveraging of toll rates is a natural development of competition since high traffic density along some routes lowers the cost per conversation-minute-mile for that route, whereas less dense

routes have much higher costs per conversation-minute-mile. Therefore, Continental testified, one of the results of competition would be increased rates on rural routes, unless some means is found to subsidize such service.

Navajo testified that should the Commission authorize competition in any form within the state of Utah, care must be taken to insure that the access charge revenues generated are adequate to maintain earnings levels currently being experienced by local exchange carriers.

MCI testified that Utah residents would benefit from facility-based competition in the intra-LATA long distance market. Competitive markets are superior to uncompetitive markets at producing the goods and services demanded by consumers; competitive markets result in the most efficient use of productive resources; competition offers the greatest opportunity to introduce new technologies and services; and competition allows society to spend less on regulatory procedures.

AT&T presented the results of its study of the current status of telecommunications competition in Utah, the growth of competition during the last two years, the economic impact of sanctioning full intra-LATA competition in Utah, and the problem of providing service in an economically efficient manner to remote areas and to low-income residents. Four general conclusions resulted from the study:

(1) Interexchange carriers have significantly penetrated all segments of the telecommunications interexchange market in Utah. Ten percent of residential and 41 percent of business customers in Utah currently use carriers other than Mountain Bell or AT&T Communications for their long distance calls.

(2) The growth of alternative carriers' share of the interstate and intrastate market has been dramatic over the past two years.

(3) The use of alternative carrier services is heavily skewed toward high-volume users. Of residential customers whose long distance bills are less than $25 per month, only five percent had shifted to alternative carriers. Of those customers with bills between $25 and $49 per month, 11 percent were using alternative carriers and for those customers with long distance bills exceeding $50 per month, 26 percent had shifted to alternative carriers. For those business customers with $25 or less in long distance billings per month, only three percent had shifted; for those customers between $50 and $100 per month, 37 percent had shifted; between $100 and $300, almost 50 percent had shifted, and if the bill exceeded $300 per month those using alternative carriers was approximately 80 percent.

(4) Most business and residence customers of alternative carriers are already using those services to place intrastate calls.

AT&T recommended that the Commission open the intra-LATA intrastate market to facility-based interexchange carrier competition and claimed that the competitive environment would create an incentive to offer new and creative services, would stimulate rapid technological improvements as carriers are given incentives to modernize plant, would create incentives for carriers to keep their costs at the lowest possible level, and would result generally in lower priced services.

The Division stated that competition has already been authorized for intrastate intra-LATA toll service provided by intrastate interexchange resale carriers. The possibility of reduced toll revenues for Mountain Bell and the UIEC do not justify a regulatory response of attempting to restrict the competition for intrastate toll service by facility-based interexchange carriers.

1. Resellers

AT&T testified that the reseller definition is very complicated and unclear and that no distinction should be made between sellers and resellers in the state of Utah. The Division testified that from the standpoint of the telecommunication customer there is not any difference between a reseller and a SCC.

2. Interexchange Facility-Based Carrier Competition

AT&T testified that facility-based competition should not threaten universal service, since the Commission may use access charges as a means of providing cost support for local service. AT&T recommended the approval of intrastate competition for all companies offering long distance service to the public because intrastate competition already exists and the Commission can assure that the potential benefits thereof flow to consumers in Utah only by establishing the proper competitive environment. AT&T contends that if facility-based competition is not allowed, a double standard would be created which would exclude AT&T from a market that all other carriers can enter on a resale basis. The Division recommended that the Commission adopt no distinction between resellers and facility-based Specialized Common Carriers (SCC's) and recommended that intrastate facility-based competition be allowed.

Mountain Bell strongly supported allowing competition to exist but asserted that all interexchange carriers (facility-based or not) must face equal regulation. UIEC testified that not enough information is known as to the impact that interexchange facility-based competition would have on local rates and Universal Service. UIEC proposed that a task force be formed to examine the impacts of competition and to make proposals to the Commission concerning the movement to interexchange facility-based competition.

3. Dominant/Non-Dominant Carrier

The Division recommended that intrastate inter-LATA and intra-LATA competition should be based on a dominant/non-dominant carrier form of regulation. Mountain Bell should be classified as a dominant carrier of intrastate intra-LATA services because it can significantly influence the rates of its competition by the levels of its access service charges. The intrastate resale carriers and SCC's should be classified as non-dominant carriers. Mountain Bell, as the dominant intrastate interexchange carrier, would continue to be subject to its current revenue and rate regulation requirements. The non-dominant carriers, on the other hand, should be subject to the certificate application, tariff and other minimal regulatory requirements outlined in the Division's proposed rules for intrastate resale carriers.

MCI agreed with the Division's proposal that the Commission adopt a dominant/non-dominant regulatory approach, with Mountain Bell regulated as the dominant carrier. The reason for this proposal is that Mountain Bell has market power as a supplier of intra-LATA services and should be regulated. Furthermore, Mountain Bell enjoys superior interconnection which gives it significant advantages. MCI should be subject to "streamlined" regulation only, because detailed oversight of rate of return, tariff races and facilities is not necessary because MCI does not possess market power.

AT&T testified that the Commission should begin to relax regulatory requirements for all interexchange carriers. AT&T suggested that earnings regulation be eliminated and tariff filing requirements streamlined. AT&T testified that this would not harm consumers.

With regard to the type of regulation that carriers should be subject to, AT&T testified that any attempt to regulate some firms fully and allow others to be regulated in a less stringent manner or to be subject to less stringent requirements is not an appropriate policy for the Commission to adopt. AT&T testified that dominant/non-dominant regulation inevitably results in the loss of market share by the dominant firm even though such a firm may have lower marginal costs and may be the low-cost or the most efficient carrier.

Mountain Bell stated that intra-LATA competition should be authorized with little or no regulatory oversight, provided Mountain Bell is permitted to compete on equal terms. Mountain Bell desires to compete at the same level of regulation as other providers of intrastate intra-LATA toll competition.

4. Ubiquitous Service

Mountain Bell stated its intention to continue to provide ubiquitous service. There are no plans by Mountain Bell at this time to reduce the amount of service it provides.

MCI stated it is not capable at this time of providing ubiquitous service and intends to expand its presence as equal access becomes available.

The Division testified that it would be impractical and unnecessary to require all intra-LATA SCC's to provide call origination service within the state of Utah when it is not required of telecommunication resellers.

5. 1 + Dialing

Mountain Bell testified that it must be able to retain its exclusive right to 1 + Dialing intra-LATA access. Otherwise it would be placed at a competitive disadvantage since it cannot provide interstate services.

The Division recommended that Mountain Bell remain the preference carrier for intrastate intra-LATA toll services, and as such, be the only interexchange carrier authorized to provide "dial 1" intra-LATA toll service. In exchange for that right, the Division recommended that Mountain Bell be designated the carrier of last resort for any customer requiring intra-LATA long distance service and that AT&T Communications should be the carrier of last resort for intrastate inter-LATA long distance toll services.

TRU stated that the Division's proposal to allow Mountain Bell to be the sole provider of "Dial 1" service in the state of Utah ran counter to the concept of "equal access" since "equal access without 1 plus dialing is not equal access."

Mountain Bell rebutted TRU by indicating equal access was an interstate item required by the Modified Final Judgment and that this allows the Bell operating companies to retain 1 plus dialing on an intra-LATA basis.

6. Preference Carrier

The UIEC recommended that Mountain Bell be designated as the preference carrier and carrier of last resort. Contel indicated that Mountain Bell should be designated the carrier of last resort and that Mountain Bell should be responsible for preparing toll rate tariffs in the state of Utah. Mountain Bell recognizes that it is the provider of last resort within its certified territory. The Division recommended that Mountain Bell be designated as the preference carrier.

7. Non-Traffic Sensitive (NTS) and Traffic Sensitive (TS) Cost

Continental testified that toll carriers should reimburse local exchange carriers within the LATA through the use of access services and that interexchange carriers should be regulated if their traffic in the intra-LATA market becomes more than incidental. Continental indicated that the exchange carriers' local distribution plant is part of the integrated telecommunications network and is of great value to an interexchange carrier. Since total loop usage is part of toll costs, toll users should be responsible for covering an appropriate share of the NTS costs. This argues for a non-weighted minutes-of-use factor to allocate NTS costs to toll services.

With regard to NTS costs, AT&T testified that predivestiture support levels from intrastate toll should be identified, capped and phased down over a predetermined schedule. Rates for the recovery of NTS cost subsidy levels should be set

accordingly. AT&T further testified that Utah's proposed access charge is based on the interstate cost, as developed by the FCC, which assigns some cost not incurred or duplicated in providing access to Utah's local exchange network. This implies that Utah intrastate toll subsidy of NTS cost has been occurring at the same level as the intrastate toll subsidy. This assumption represents a discriminatory intrastate cost increase. These access charge levels appear to be out of line with the rates charged to customers who obtain access directly from the local exchange carriers for intra-LATA toll and private line.

TRU testified that Mountain Bell's proposed toll rate reduction in Docket No. 84-049-01 would further widen the gap between the rates for its intra-LATA toll customers when compared with the access costs which are included in the rates charged to intrastate customers of the interexchange carriers.

Mountain Bell responded to a statement by AT&T expressing concern that Mountain Bell's toll rates as proposed in the 1984 rate case would not provide as much NTS cost support as the access charge proposed by Mountain Bell would. In that regard Mountain Bell provided an analysis based on 1983 actual data which indicated that currently Mountain Bell is providing greater NTS cost support than is provided under access charges and that even with the proposed toll reduction the amount of NTS cost support from access charges and from Mountain Bell toll rates would be roughly equivalent.

The UIEC requested that interexchange carriers continue to pay their fair share of NTS costs.

8. Deaveraging of Toll Routes

Mountain Bell asserted that it must be able to separately price specific toll routes and to deaverage rates on competitive routes. The Division's position is that Mountain Bell should be allowed to competitively price its long distance services and to submit innovative toll pricing tariffs.

UIEC recommended a carefully formulated plan to introduce toll competition into the Utah intra-LATA market and incorporate within that plan measures to mitigate the negative consequences of toll competition. These measures should include establishing an appropriate regulatory environment, requiring local exchange carriers to develop intra-LATA access tariffs based on Utah-specific costs and developing universal service and life-line service procedures and funds.

9. Mountain Bell Separation of Competitive and Non-Competitive Services

Mountain Bell stated that equivalent regulatory treatment should be afforded all carriers, including Mountain Bell, provided Mountain Bell separates its regulated costs and revenues from its interexchange costs and revenues. The latter issue, however, should be explored in a separate proceeding. Mountain Bell recommended that the Commission order it to remove its competitive interexchange investments, expenses and revenues from its regulated rate base, but to do so in a separate proceeding. Mountain Bell agreed that its competitors need to be

assured that Mountain Bell does not subsidize its competitive services with monopoly revenues and that the costs of Mountain Bell's competitive services reflect comparable costs charged to carriers under access charges.

TRU, MCI, Sprint and AT&T agreed that Mountain Bell should separate its competitive services from its other services.

E. Bypass

Mountain Bell presented the results of a study of the nature, extent and implications of bypass in Utah. The study, based on interviews with the largest users of Mountain Bell's Utah services, found:

(1) One in eight of the largest Utah customers of Mountain Bell already engages in bypass.

(2) One in four of Mountain Bell's largest Utah customers have indicated an intent to bypass in the future, depending in part on attractiveness of new technologies.

(3) Bypass is accelerating in Utah.

(4) The decision to bypass is primarily motivated by the customer's opportunity to reduce costs.

(5) The interexchange market will become increasingly competitive. As a result, interexchange carriers may soon begin interconnecting their switches directly to the premises of the large customers. The potential revenue loss to Mountain Bell could be massive if interexchange carriers sell bypass on a large scale.

(6) Revenue lost to bypass is lost in the current year and in future years.

Mountain Bell recommended that the Commission take actions necessary to enable it to compete effectively. Bypass should not be encouraged by inappropriate pricing of Mountain Bell services. Some means by which other regulators have dealt with the bypass problem include:

(1) Termination liability requiring large users to pay for unamortized plant stranded when bypass occurs;

(2) Contractual arrangements, instead of tariffs, governing terms of service to large users;

(3) Pricing services at incremental cost, rather than average cost;

(4) Capping the amount of NTS costs recovered from large users in order to prevent recovery of costs not caused by large users;

(5) Deaveraging prices for services in highly competitive zones or along highly competitive routes;

(6) Permitting discretionary price changes by a Company, within Commission-approved minimum and maximum prices;

(7) Reducing the time before new prices become effective in competitive offerings;

(8) Imposing the same degree of regulation on all competitors; and

(9) Total deregulation of specific services for which the Commission determines that a competitive market exists.

Since Mountain Bell no longer has an absolute monopoly on the origination and termination of traffic in its service area, the Company must be allowed to compete on the basis of price and customer services or it will lose its customer base.

The Division recommended that the tariffs be revised to prevent end-users from obtaining access services unless they have their own private telecommunications system which is a by-pass system.

F. Universal Service

Mountain Bell stated that it remains committed to universal service, interpreting this to mean that virtually everyone should have access to basic service. The problem, then, is how best to subsidize the service for those who cannot afford it. Mountain Bell stated that this problem is made more difficult by the fact that it, now facing a competitive marketplace, must depart from traditional average-cost pricing. Mountain Bell agrees that low-income customers should be assisted by funds obtained through legislative action, but, if the Legislature does not act, the Company does not oppose changes in rate structure to obtain the same end. According to Mountain Bell, basic telephone service should be available at affordable rates to a high percentage of persons--similar to the percentage who now enjoy such service. The question is, who should receive the subsidy and

from whom should it be derived. Mountain Bell testified that subsidy alternatives include legislative subsidization to the indigent, a universal service fund, and NTS cost support through access charges assessed equally to all carriers, including Mountain Bell. Hearings should be held to examine the costs of providing basic telephone service in Utah,as such data is a prerequisite for such public policy decisions.

1. High Cost Areas

Continental testified that if intrastate competition is allowed, some substitute for pooling of revenues, which would offer cost protection to high cost toll routes, must be put in place.

AT&T recognized the need for subsidization in high cost areas of the state or to low-income residents. The most efficient solution is to target subsidies for those portions of the market not attractive to competition. With regard to high cost areas and in order to avoid unacceptable increases in local subscriber rates, AT&T testified that some selected limitation on the speed of the proposed phase-out of non-traffic sensitive cost subsidies and/or the establishment of a high-cost fund to assist in limiting subscriber rate increases may be necessary and appropriate for the Commission to consider.

2. Universal Service Fund

The Division indicated that universal service can no longer be guaranteed by intrastate toll revenues. As a consequence, the Division recommended that a state universal service

fund be established, with contributions provided by a surcharge on minutes of use of switched access services. Under the access services tariff, this would be applied to all specialized common carriers and private bypass systems. The Division recommended that the Commission should establish a separate proceeding to further consider a state universal service fund, surcharge amounts and means of distributing funds to support a subsidized budget service for low-income subscribers.

G. Public Witnesses

In addition to the testimony presented by the various parties, seven witnesses appeared as public witnesses in this proceeding. Mr. Arthur W. Brothers, the President of Beehive Telephone Company, presented several exhibits which attempt to develop what an appropriate cost would be on a statewide basis for NTS plant. Mr. Brothers suggested to the Commission that, if it wishes to address the issue of competition in Utah, local exchange companies must be directed to file tariffs showing a cents-per-minute charge on all long distance calls. Mr. Brothers proposed a rate of ten cents per minute for terminating traffic and five cents per minute for outgoing plus incoming traffic. He testified that local exchange carriers cannot continue to exist in the environment of competition unless they are able to charge for the use of NTS plant. Fifty percent of the revenue requirement should be derived from toll, based on a minutes-of-use charge. The remaining revenue requirement can be achieved through local service charges.

Mr. Cox, representing Central Utah Telephone Company, described the service provided by this company and indicated the importance of telephone service to the industrial base of Sanpete County. He further indicated that large increases in basic telephone rates would have devastating effects on the residents in his area.

Public testimony was presented by Mr. Bruce B. Hall, an employee of Crescent Cardboard Company. Mr. Hall's testimony related to his company's attempt to interconnect with a facility-based carrier known as Systems Communications Corporation (Syscom) in the Uintah County area. The thrust of his testimony was to encourage the Commission to give an early hearing date and consideration to the application of Syscom for certification.

Mr. Bryan L. Jacobs, an employee of Motorola Communications and Electronics, presented testimony similar to that of Mr. Hall, encouraging the Commission to give consideration to the certificate application of Syscom. Mr. Jacobs indicated that his company was the provider of certain equipment to Syscom.

The final public witness was Dr. George Compton, a self-employed utility regulation consultant. The thrust of Dr. Compton's testimony was that lowered toll rates along the Wasatch Front are in the public interest. Dr. Compton presented four hypothetical strategies for reducing toll rates in the presence of competition. The essence of Dr. Compton's testimony was that competition is appropriate and should be allowed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission finds that the answers to its questions, posed in its order of June 1, 1984, are:

Q. Should the Commission authorize intrastate intra-LATA competition by Specialized Common Carriers (SCC's) for message telecommunication services?

A. The Commission should not allow, at this time, competition by specialized common carriers or facility-based interexchange carriers. As recommended by UIEC, a telecommunications task force should be established to analyze and determine the effect of such competition on the local exchange carriers.

Q. What impact would intra-LATA competition by SCC's have on Mountain Bell's and the independent telephone companies' revenues from message telecommunication services?

A. The impact of intra-LATA competition has not been determined and needs further study.

Q. What revisions to Mountain Bell's intra-LATA message telecommunication service rates would be required for Mountain Bell to remain competitive with the SCC's?

A. Mountain Bell would have to be competitive, have a separate account, and pay the same for access as other common carriers.

Q. Would the approval of intrastate intra-LATA competition by the SCC's for message telecommunication services

require the establishment of intra-LATA carriers access charges? If yes, how should the intra-LATA carriers access charges be structured? How should the intra-state allocation of non-traffic sensitive costs be apportioned between the inter-LATA carriers access charges, intra-LATA carriers access charges, intra-LATA message telecommunication service and wide area telecommunication service rates and the rates for local exchange services?

A. The need for an access charge is not dependent on the approval of facility-based interexchange competition. Competition already exists between Mountain Bell and the resellers on an inter- and intra-LATA basis and access charges are required. These charges should be based on the non-discounted interstate access charges implemented by the FCC. Non-traffic sensitive cost should be apportioned between all services, but a Utah specific analysis is required for this purpose.

Q. Should Mountain Bell and the independent telephone companies be allowed to provide ancilliary services (billing services, recording services, directory assistance service, security investigative services, and testing services) to SCC's that compete for intra-LATA message telecommunication services?

A. Mountain Bell and the independent telephone companies should be allowed to provide ancilliary services to

interexchange carriers that compete for intra-LATA message telecommunication services.

Q. What are Mountain Bell's plans and time schedules to provide equal exchange access to all SCC's for inter-LATA message telecommunication services? When will pre-subscription to the interexchange carriers be initiated by Mountain Bell? Will the equal access connections allow Mountain Bell or the SCC's to prevent the SCC's customers from using their system for intra-LATA telecommunication services?

A. Mountain Bell has already started the switch to equal access as required under divestiture. Pre-subscription has also been initiated. Equal access (FGD) will allow interexchange carriers to prevent customers from using their system for intra-LATA calls. Equal access will be available for 80 percent of Mountain Bell lines by September 1, 1986.

Q. Should the Commission set a specific intrastate usage limitation for SCC's below which they could continue to operate without a Certificate of Convenience and Necessity and tariffs?

A. Because of the lack of information on intrastate usage, SCC's and other interexchange carriers must obtain certificates as resellers for the intrastate calls completed over their systems. (See Finding of Fact Number 4 below.)

Q. What standards should the Commission use to affirm the fitness of an SCC to receive a Certificate of Convenience and Necessity to operate as an intra-LATA carrier? On what basis should the Commission approve rates and tariffs for an SCC providing intra-LATA message telecommunication services? Should the Commission forbear from regulating rates, requiring tariffs or applying any of its existing rules and regulations for an SCC providing intra-LATA message telecommunication services? Should the Commission establish any new regulatory requirements for an SCC providing intra-LATA message telecommunication services?

A. The standards, rates and tariff approval, exempting or applying existing rules, or development of additional rules and regulation for facility-based interexchange carriers, if allowed, should be determined after the impact of such competition has been analyzed by the telecommunications task force and reported to the Commission. In the interim the SCC's will operate under the rules which apply to resellers.

Q. Should SCC's be required to provide ubiquitous intra-LATA message telecommunication services?

A. SCC's and other interexchange carriers cannot at the outset, nor possibly in the future, provide ubiquitous service and therefore should not be required to provide ubiquitous service.

Q. Should Mountain Bell be designated as the "preference carrier" for intra-LATA message telecommunication services?

A. Mountain Bell should be designated as "preference carrier" at least until the telecommunications task force has completed its study.

Q. Should Mountain Bell be designated as the "carrier of last resort" for intra-LATA message telecommunication services?

A. Mountain Bell stated that is is willing to be the "carrier of last resort" and will be considered so at least until additional study by the telecommunication task force has been completed.

Q. If intra-LATA competition is not authorized, should the Commission require interstate SCC's to install equipment to block intra-LATA message telecommunication service?

A. In addition to the evidence and testimony herein, the Commission takes administrative notice of the testimonys filed in cases 84-094-01 and 84-095-02 in which the ability of SCC's and other interexchange carriers to block intrastate calls has been at issue. The aforementioned cases were dismissed when the parties (MCI and Sprint) received certificates to be resellers. Issuing resellers certificates seems the most logical solution to this question. The Commission finds that

either blocking unauthorized intrastate calls or the reporting of intrastate calls completed as resellers should be requirements of SCC's operating in Utah. (See Finding and Conclusion No. 4 below.)

2. National policy, primarily antitrust policy, does not pursuade the Commission that state regulatory policy should encourage competition at the expense of reasonable service to the citizens of this state. Evidence on this record is inconclusive but does cast doubt on the soundness of encouraging competition at the expense of reasonably priced service, particularly in areas outside the Wasatch Front.

The effect of the Commission's finding is that, until clear and convincing evidence shows that the benefits of competition outweigh the effect of higher local service cost on universal service, Utah regulation will not encourage competition by providing the competitors of interexchange carriers discounts or allowing point-to-point competition, and will require access charges based on the nondiscounted FCC tariff.

The Commission finds that competition for intra-LATA toll traffic should be permitted only for resellers using the facilities of the presently certificated exchange carriers.

3. The Commission finds FGA-FX/ONAL service, is similar to the present foreign exchange services offered by local exchange carriers. Therefore, FGA-FX/ONAL should be restricted to the local calling area.

4. The Commission finds that the connections of interstate and intrastate FGA and B are identical. The need to separate the usage between jurisdictions becomes necessary with the difference in rates between interstate and intrastate FGA and B. Therefore, the Commission will require: 1) interexchange carriers utilizing feature group connections for interstate service, but not certificated to complete intra-LATA toll calls, must block all unauthorized intra-LATA calls, or 2) each certificated interexchange carrier utilizing feature group connections to complete intrastate calls must file quarterly reports with the local exchange carrier and the Division showing the number of intrastate minutes of use per circuit. The interexchange carriers shall maintain records of use, which may be audited by independent auditors upon the request of the local exchange carrier or the Division. Any interexchange carrier failing to provide such a quarterly report or auditable records will face a rebuttable presumption that all usage of the circuit is intrastate.

5. The Commission finds that the billing services and other ancillary services relating to FGA, B and D connections provided by local exchange carriers to interexchange carriers are of value to those carriers. In addition, billing and ancillary services can provide a source of revenue to help reduce the need to increase local rates due to inter and intrastate toll competition. Therefore, approval for billing and ancillary

service should be granted, allowing termination of local service for non-payment of long-distance bills collected by the local exchange carrier.

6. The Commission finds that an end-user line charge has not been proposed and, therefore, makes no determination of this issue at this time.

7. Competitors in the intrastate toll market need to cover the cost they impose on the network. Rates for services to interexchange carriers should be set to cover the costs of interexchange carriers' usage of the network as well as connection costs.

8. Time-of-day pricing for FGA and B has not been cost-justified in this proceeding and should be denied without prejudice.

9. The Commission finds that the request for a specific element to access the network by coinless pay phones of interexchange carriers has merit. Therefore, local exchange carriers should modify their access tariffs to include a specific element for coinless pay phones of interexchange carriers within 60 days of the effective date of this order. This element should, at minimum, parallel the privately-owned coin-operated telephone tariffs approved by this Commission.

10. The Commission finds that special access services, which are not available at this time, should be approved upon acceptance by the FCC of Mountain Bell's proposed tariff.

11. The Commission finds that the access tariffs proposed by the local exchange carriers are fair and reasonable

12. The Commission adheres to the definition of "resellers" used in Case No. 82-999-05, and rejects the changes proposed by AT&T and the Division for the reason that a reseller does not own the transmission path by which intrastate long distance calls are completed.

13. The Commission finds that additional information on the impact of facility-based interexchange carrier competition is needed. Therefore, the Commission will not allow facility-based interexchange carriers to compete in intrastate telecommunication services but will reconsider the issue when the telecommunications task force presents its findings to this Commission on the impact of facility-based interexchange carrier competition and other related issues.

14. The Commission finds that the issue of dominant/nondominant carrier regulation and its impact should be further explored by the telecommunications task force.

15. The Commission finds that Mountain Bell will continue to provide ubiquitous service in its service area and would have to obtain permission from this Commission to discontinue ubiquitous service provision. However, other interexchange carriers do not have the ability to provide ubiquitous service and therefore, will not be subject to requirement.

16. The Commission finds that Mountain Bell, at present, is restricted by Judge Greene's Modified Final Judgment from providing inter-LATA and interstate service. Providing "1+ Dialing" to all intrastate intra-LATA interexchange carriers

would place Mountain Bell at a disadvantage. Therefore Mountain Bell is not required to provide "1+ Dialing" to intrastate intra-LATA interexchange carriers at this time.

17. The Commission finds that additional information should be obtained by the telecommunications task force regarding preference carrier regulatior

18. The Commission finds that more cost information is required for purposes of appropriately allocating NTS cost to access charges. Utah-specific costs must be developed. The telecommunications task force should examine these issues and make recommendations to the Commission regarding them.

19. The Commission requires additional information on deaveraging toll route charges. The telecommunications task force should examine this issue and make recommendations to the Commission regarding it.

20. The Commission finds that Mountain Bell's request for a hearing to separate its competitive services from regulated services can wait until the telecommunications task force has made its recommendations to this Commission.

21. The Commission finds that by-pass is another form of competition faced by Mountain Bell. Therefore, the telecommunications task force should make recommendation to this Commission about by-pass.

22. The Commission finds that the issues involving universal service (high-cost areas and universal fund) should be further studied either by the telecommunications task force or in the lifeline proceeding, Case No. 85-999-13.

23. The Commission finds that WATS resellers have heretofore been in violation of our earlier orders. However, based on the record herein, it is in the public interest to modify the certificates of such WATS resellers to include long distance telecommunications utilizing feature group services. Modification of the certificates will be allowed by application and Commission summary procedure. No further hearing is necessary.

Based on the foregoing, the Commission makes the following

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That:

1. The access charge tariffs be and are hereby approved as modified in the Findings of Fact, to be effective as of December 1, 1985, or as soon thereafter as practicable.

2. A telecommunications task force, consisting of representatives of Mountain Bell, the Utah Independent Exchange Carriers, the Division, the Committee, AT&T, the SCC's and the Commission, is to be formed. Names of the representatives shall be submitted to this Commission within 30 days from the date of issuance of this order and a meeting to organize the task force shall be conducted within 45 days of the issuance of this Order.

The telecommunications task force will study the following issues:

a) Benefits and problems associated with an orderly transition to a facility-based competitive market for provision of long distance services, with emphasis on the problems of deaveraging toll routes and protection of universal service.

b) The extent and type of regulation required to insure a competitive market; the problems of dominant/non-dominant regulation, ubiquitous service, and preference carrier.

c) Utah-specific costs to be included in access charges.

d) The Commission recognizes that widely divergent views will be represented on the telecommunications task force and does not expect consensus on every issue. The Commission does anticipate an analysis of the pros and cons from the perspective of all parties.

3. Facility-based interexchange carrier competition is disallowed until and unless the findings and recommendations of the telecommunications task force, having been fully considered in subsequent proceedings, show such competition to be in the public interest.

4. IT IS FURTHER ORDERED that all presently certificated WATS resellers may petition the Commission, by summary procedure without further hearing, for an amendment to their certificates to allow resale utilizing feature group services.

DATED at Salt Lake City, Utah, this 29th day of October, 1985.

Brent H. Cameron, Chairman

James M. Byrne, Commissioner

David R. Irvine,
Commissioner Pro Tempore

Attest:

Georgia B. Peterson
Executive Secretary

EXHIBIT B

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation of the Sale and Resale of Intrastate Communications Services.	)	CASE NO. 82-999-05
In the Matter of the Investigation of Sellers of Intrastate Communications Services in Utah.	)	CASE NO. 82-999-07
		REPORT AND ORDER
In the Matter of the Investigation of Intrastate Message Telecommunications Services in Utah.	)	CASE NO. 82-999-08
In the Matter of the Investigation of Intrastate Wide Area Telecommunications Services in Utah.	)	CASE NO. 82-999-09

Submitted: January 10, 1983 Issued: April 14, 1983

Appearances:

James J. Cassity, Assistant Attorney General	For	Division of Public Utilities, Department of Business Regulation, State of Utah
David E. Salisbury Ted D. Smith	"	The Mountain States Telephone and Telegraph Company
Michael Smith, Assistant Attorney General	"	Utah State University, University of Utah, Weber State College, The Utah State Department of Administrative Services.

John W. Horsley	For	Continental Telephone Company of the West
L. Ridd Larson A. Robert Thorup Jose Guzman, Jr.	"	Southern Pacific Communications Company
Randy L. Dryer Ruth S. Baker-Battist	"	MCI Telecommunications Corporation
Brinton R. Burbidge	"	Comput-A-Call International; Dial America, Inc.; Tel-America, Inc.; and Lo-Tel
Stuart L. Poelman	"	Tel America

By the Commission:

On September 16, 1982, the Division of Public Utilities filed a Petition to initiate a generic proceeding and to hold public hearings in connection therewith to investigate, review and consider issues relating to the sale and resale of intrastate communication services, including but not limited to Wide Area Telecommunication Services (WATS), Message Telecommunication Services (MTS), Private Line and Local Exchange Services throughout all areas within the State of Utah. In the past few years, competition in the interstate long distance market has increased substantially. Numerous companies have begun offering interstate Message Telecommunication Services in competition with the Bell System and other independent telephone companies. These companies may be divided into two main categories--sellers and resellers. As a result of their development of the facilities to provide interstate service, these companies have also acquired the capacity to provide intrastate services.

A seller of telecommunication services provides basic communication service to its customers. Basic communication services include MTS and WATS. Intrastate MTS in Utah is ordinarily known as long distance service. It consists of furnishing facilities for telecommunications between stations in different local service areas but within Utah. A detailed bill may be furnished subscribers with each MTS call itemized and charged separately on a per-message toll basis. This service is furnished through standard telecommunication phone equipment which also allows a subscriber to call non-toll points.

Intrastate WATS consists of the furnishing of facilities to the public for in or out dial-type communications between a station associated with a WATS access line and other stations outside the local service area but within Utah. At the time of the hearing WATS subscribers (because of revised tariffs) could choose between two usage options. No itemized billing is provided as part of the service.

Conventional telephone utilities, or sellers, supply basic communication services through facilities which the sellers own, or through a mixture of owned and leased facilities. Sellers do not operate through intermediaries such as brokers; rather, they provide their services directly to their customers.

A reseller of telecommunication services subscribes to the basic communications services and facilities of an underlying carrier (usually a seller) and then offers those same

communication services and facilities to the public for profit. There are two kinds of resellers. These are brokers and processors.

In regard to brokers and processors, the FCC has stated that:

> [t]he broker merely acts as an intermediary between the underlying carrier and end user, who ultimately controls the utilization of a communication facility or service subscribed to by the broker. The broker thus functions as a middleman, uniting the underlying carrier (seller) and the end user through an intermediary under terms of price and delivery which presumably will be sufficiently favorable to the end user to warrant the brokerage fee. Thus, the end user is the broker's customer, just as the broker is the customer of the underlying carrier.
>
> Unlike the broker the retail processor retains continuous control over the utilization of services and facilities furnished by the underlying carriers. The fundamental offering of the communications carrier is supplemented by other facilities or services, and the resulting package, which includes resold communications service, is offered to the public. One such supplemental service is the computer. In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 272 (1976).

On September 24, 1982, the Commission issued an Order instituting a formal proceeding to investigate, review and consider issues relating to the sale and resale of intrastate communication services. On October 20, 1982, the Commission held a pre-hearing conference and established a procedural format for

the resolution of the issues set forth in its Order of September 24, 1982.

The Commission's procedural format provided that the questions relating to its jurisdiction over entities offering intrastate telecommunication services would be divided into three jurisdictional categories with each category to be severed from the body of the main proceeding, to be treated as a separate case and to receive a separate docket number. Parties participating in each proceeding were asked to respond to the following questions:

1. Does a seller and/or a reseller of intrastate telecommunication services qualify as a public utility as defined in Utah Code Ann. § 54-2-1 (1953, as amended)?

2. If a seller and/or a reseller of intrastate telecommunication services is found to be a public utility as defined by Utah law, is that seller and/or reseller required to obtain a certificate of public convenience and necessity prior to commencing business?

3. If a seller and/or reseller of intrastate telecommunication services is found to be a public utility as defined by Utah law, is that seller and/or reseller required to conduct its operations in the manner prescribed by the rules and regulations of the Commission and the laws of the State of Utah?

4. Are sellers and/or resellers of intrastate telecommunication services subject to local franchise taxes and/or state regulatory fees?

The briefs and oral arguments submitted by the Division of Public Utilities and the Mountain States Telephone and Telegraph Company and concurred in by the Continental Telephone Company of the West outlined the criteria for determining whether or not a particular entity is a public utility under Utah law.

Southern Pacific Communications Company (SPCC) and MCI Telecommunications Corporation (MCI) argued that they are engaged presently in the providing of interstate telecommunications services as Specialized Common Carriers. These companies further argued that the FCC has exclusive jurisdiction over them. In addition, the two parties suggested that if this Commission were to take jurisdiction over them and attempt to regulate their business, this would constitute an unreasonable burden on interstate commerce.

The parties to the proceeding who are resellers of WATS service argued that their businesses did not constitute public utilities under Utah statutory law and suggested that the Commission should adopt a broad interpretation as to the intent, rather than the letter, of the statutory provisions in order to hold that they should not be classified as public utilities. As an alternative argument, they suggested that should the Commission determine that they are public utilities, rules and regulations

CONCLUSIONS OF LAW

1. Regulation of sellers and resellers depends upon whether these entities offer interstate or intrastate telecommunication services. The Federal Communications Act of 1934, Section 1 et seq 47 USC § 151 et seq. (1981) (Communication Act), created the Federal Communications Commission. Section 1 states that the Congress created the FCC for "the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, a rapid, efficient nationwide and worldwide wire and radio communication service, with adequate facilities at reasonable charges . . . ." Section 2(a) of the Communications Act applies to "all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication . . . ." Section 3 subsections (a) and (b) give the Commission authority over interstate communications by wire or radio, which covers not only the transmission of messages but also "all instrumentalities, facilities, apparatuses and services incidental to such transmission."

Section 3(e) defines interstate communication as "communication or transmission (1) from any State, Territory or possession of the United States . . . or the District of Columbia, to any other State, Territory or possession of the United States . . ." Section 3(f) defines foreign communication as "communication or

transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States."

2. State authority is set forth in Section 2(b). This provision states that:

> [n]othing in the Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulation for or in connection with intrastate services, facilities or regulation for or in connection with intrastate communication service by wire or radio of any carrier . . . .

Intrastate communication consists of a communication or transmission from points originating and terminating within the state. 47 USC 153(e).

3. Therefore, where sellers and/or resellers are engaged in providing interstate communication services, those entities will be governed by the FCC. Where the entities are providing intrastate services, state commissions can assume jurisdiction unless they are pre-empted otherwise. Where the entities are providing both interstate and intrastate services, the interstate business will be federally controlled while the intrastate portion may be regulated by the states unless they are pre-empted otherwise.

4. The definition of the term "public utility" in Utah Code Ann. § 54-2-1(30), includes:

> [e]very telephone corporation . . . where the service is performed for, . . . the public

> generally . . . and whenever any . . . telephone corporation performs a service for . . . the public; . . . for which any compensation or payment whatsoever is received, such . . . telephone corporation . . . is hereby declared to be a public utility, subject to the jurisdiction and regulation of the Commission and to the provisions of this title.

The foregoing statute sets forth a three-part test to determine public utility status. The three parts are: (1) the entity in question must be a telephone corporation; and (2) the entity must provide its service to the public generally; and (3) the entity must receive some type of payment or compensation for providing its service.

5. Utah Code Ann. § 54-2-1(22), defines the term "telephone corporation" and sets forth a two-part test for telephone corporation status. The statute states that "[t]he term 'telephone corporation' includes every corporation and person, their lessees, trustees, and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any telephone line for public service in this state."

The first part of the statutory test is that in order to be a "telephone corporation" an entity must be either a "corporation" or a "person." Utah Code Ann. § 54-2-1(3), defines the term "corporation" as a "corporation, an association, and joint stock company having any powers or privileges not possessed by individuals or partnerships, but shall not include towns, cities, counties, conservancy districts, improvement districts or other

improvement districts or other governmental units created or organized under any general or special law of this state." Utah Code Ann. § 54-2-1(4), defines "person" as an "individual, a firm, a corporation and a co-partnership."

6. To the extent business organizations operating as sellers and resellers of intrastate telecommunication services fall into the category of corporations, associations, joint stock companies, persons, firms, individuals and partnerships, they clearly satisfy the entity test for telephone corporation status. Towns, cities, counties, conservancy districts, improvement districts or other governmental units created or organized under any general or special law of Utah are exempt entities.

7. The second part of the test for telephone corporation status is that the corporation or person in question must own, control, operate or manage a "telephone line" for public service in Utah. Utah Code Ann. § 54-2-1(21), states that a telephone line includes "all conduits, ducts, poles, wires, cables, instruments and appliances and all other real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone whether such communication is had with or without the use of transmission wires."

8. Telecommunications organizations usually own or operate, control and manage some portion of the telephone equipment and facilities on their premises in order to provide

telecommunication services. The very nature of telecommunication sale activity may require sellers and resellers to be able to identify and measure services provided, store information about customer billing and bill customers. These requirements may necessitate the purchase or operation, control and management of computer and switching equipment, various forms of terminal equipment, lines, cables, instruments, appliances, real property, fixtures and other forms of personal property. Utah law clearly establishes that wires, cables, instruments, appliances, real property, fixtures, other forms of personal property used in connection with the provision of telephone service constitute telephone lines. Therefore, any provision of intrastate telecommunication service would require some type of ownership or operation, management and control of a telephone line.

9. The second part of the test for public utility status is that the telephone corporation must provide its service to the "public generally." The Utah Supreme Court, in a series of cases, has established the meaning of providing service to the "public generally." The most recent case, Medic-Call, Inc. v. Public Service Commission, 24 Utah 2d 273, 470 P. 2d 258 (1970), sets forth the governing principle as follows:

> The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding

> himself out as serving or ready to serve only particular individuals."

Without restating the holding of the various cases, the common thread running through the Utah case law is the concept that in order to qualify as a public utility, access to the utility services must not be restricted. The cases generally hold that various entities would be deemed to serve "the public generally" when they provide public utility service to anyone who applies for it and not just to a restricted few. It is not necessary that the service be restricted to a given geographical area or be economically beneficial only to a certain segment of the public.

10. The third part of the test for public utility status is that the public utility services must be provided in return for some type of payment or compensation. Any time a business entity charges for the provision of a public utility service, that charge constitutes payment or compensation whether such payment or compensation is money or other valuable property.

11. All of the parties to this proceeding, to the extent they are engaged in providing intrastate telecommunication services, are public utilities subject to the jurisdiction of this Commission. Specifically, SPCC, MCI and other parties offering similar interstate services, to the extent that they provide the facilities which enable customers to make intrastate calls (calls originating and terminating within the State of Utah) are subject to the jurisdiction of this Commission with

respect to their intrastate services. The Commission also concludes that those parties engaged or which propose to engage in the resale of WATS services are or will become public utilities as defined by Utah law and, therefore, also subject to the jurisdiction of this Commission. The extent to which the Commission will seek to regulate said parties is a more difficult question which we will attempt to address.

12. To the extent that the Specialized Common Carriers engaged in interstate communication services seek to hold themselves out to provide intrastate MTS service, the Commission will assume full jurisdiction over said parties and will require that they apply for a certificate of convenience and necessity and the approval of rates and tariffs before such utilities shall be authorized to provide competitive MTS services to those offered by telephone utilities presently certificated within the State of Utah. The Commission is concerned that the certificated carriers not become the "carriers of last resort" with the competitors only serving the profitable routes.

13. Merely possessing the technological capability to complete intrastate end-to-end telecommunication, however, is insufficient to require that an entity be certificated in Utah. In addition to possessing such technological capability, a seller and/or a reseller must take affirmative steps to provide intrastate telecommunications service to its customers. But where an entity takes all reasonable steps under the circumstances to

prohibit customers from completing intrastate calls, that entity should not be subjected to regulation simply because its customers make unauthorized telephone calls, Therefore, it is only where sellers and/or resellers take affirmative steps to provide telecommunications services to the public generally, in return for compensation, that they are public utilities and subject to the jurisdiction of this Commission.

14. To the extent that Specialized Common Carriers such as SPCC and MCI operate within the State of Utah only as interstate carriers and specifically advise their present and prospective customers that intrastate service is prohibited within the framework of the services which they provide, then this Commission will not require certificates of convenience and necessity in order for such companies to operate within this state. If the Commission subsequently determines that the intrastate calls being made by customers of such Specialized Common Carriers amount to a significant portion of their business, then the Commission may require that said parties apply for certificates of convenience and necessity and file tariffs with this Commission.

15. A reporting procedure should be established requiring the Specialized Common Carriers to furnish information so that this Commission can monitor the volume of the intrastate calls being placed by the customers subscribing for their interstate services.

16. It would also be desirable for a procedure to be established that would require both the Specialized Common Carriers, Mountain Bell, Continental and other telephone utilities to furnish the Commission with additional information so that a determination can be made as to whether or not reasonable steps can be taken by Specialized Common Carriers providing interstate services which would allow them to entirely block or prohibit intrastate calls by their customers.

17. Resellers of WATS service are public utilities as defined under Utah law; however, the service which they offer and the terms under which it is offered are unique. The Commission has already sanctioned the offering of WATS service to large-volume customers, and has approved tariffs which recognize the reasonable apportioning of costs to such large-volume customers. WATS resellers, in effect, are brokering an authorized service to aggregations of small-volume customers who may then realize a price benefit they could not obtain otherwise. The Commission can adequately protect the revenue base of the local operating companies through the tariffs under which resellers take service, and the rates offered by the local operating companies provide an upper limitation on the rates to customers resellers may offer in a competitive market. Resellers who operate solely pursuant to WATS tariffs filed and approved for certificated telephone utilities providing intrastate WATS service and which utilize the existing telephone network and switching facilities of

certificated local operating companies, while public utilities under Utah law, do not require the panoply of regulatory oversight which is associated with public utilities generally.

18. The statutory requirements related to applications for certificates, filings, reports, etc. may not be waived by the Commission, but it clearly is not in the public interest nor would it be sound policy to require resellers to establish the formal elements of convenience and necessity in the traditional formal manner. A formal rule-making procedure should be established to standardize a practicable application procedure for resellers, but on an interim basis the Commission concludes that resellers should be issued certificates of convenience and necessity upon an administrative determination of fitness to serve, based upon an application to the Commission which would include:

(1) The name and address of the applicant, its officers or principals.

(2) A description of the operation proposed to be performed.

(3) If the applicant is a corporation, a copy of its Articles of Incorporation.

(4) A statement showing the financial condition of the applicant.

(5) The manner in which it is proposed to finance the operation, and details of loans incidental to the capitalization of the operation.

(6) A statement of the terms and conditions of service it proposes to offer to the public.

The Commission will not require hearings on applications unless requested by an applicant. The Commission concludes that the public interest does not require the filing of tariffs by such resellers, but such resellers should file with the Commission a description of any customer security deposit policy or policy requiring advance payment for services within 10 days of adoption of same. Any such policy shall have general application to all customers. Following issuance of a certificate, a hearing could be initiated to determine whether a company's conduct had been consistent with law or Commission policy, as is the case with any regulated utility.

19. Utah Code Ann., Section 54-4-25, provides that "no . . . telephone corporation . . . shall henceforth establish, or begin construction or operation of a . . . line, route, plant, or system or of any extensions of such . . . line, route, plant or system, without having first obtained from the Commission a certificate that present or future public convenience and necessity does or will require construction . . . " Therefore, any entity qualifying as a public utility in Utah must obtain a certificate of public convenience and necessity prior to beginning operation or construction. With regard to WATS resellers, such certificates should be issued administratively upon receipt of an advice letter from a reseller. Such filing is deemed

necessary to monitor the type of service being offered, and not because the Commission proposes to establish any regulatory framework which would involve considerations of rate base.

20. Sellers and resellers of intrastate telecommunications services which qualify as public utilities under Utah law must conduct their operations in the manner prescribed by the relevant Utah statutes and rules and regulations of the Utah Public Service Commission. Utah Code Ann. § 54-2-1(30), states that public utilities are "subject to the jurisdiction and regulation of the Commission under the provisions of this title." The title referred to in the foregoing statute is Utah Code Ann. Title 54. Among other things, Title 54 creates the Public Service Commission, imposes duties upon public utilities, sets forth the authority of the Commission over public utilities, establishes the public utility regulation fee, imposes regulation upon motor vehicles, and outlines practice and procedure methods before the Public Service Commission. Therefore, where Utah Code Ann. Title 54 provisions impose responsibilities upon entities operating as public utilities, these entities must conduct their operations accordingly.

21. Utah Code Ann. § 54-3-23, is one of many provisions which impose a specific obligation upon public utilities in Utah. This statute provides:

> Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or

> regulation made or prescribed by the Commission in the matters herein specified, or in any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with an observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.

The foregoing statute not only mandates compliance with Commission rules and regulations, it also places an affirmative obligation upon public utilities to secure compliance by all of its officers, agents and employees.

22. As the foregoing discussion illustrates, Utah law requires that public utilities conduct their operations in the manner prescribed by relevant Utah statutes and the rules and regulations of the Utah Public Service Commission. If sellers and resellers of intrastate telecommunications services qualify as public utilities under Utah law, these same obligations are imposed upon them also.

23. Sellers and resellers of intrastate telecommunications services which qualify as public utilities under Utah law are subject to the state regulatory fees imposed upon public utilities. Utah Code Ann. § 54-5-1.5, imposes upon all public utilities a public utilities regulation fee. The statute states in pertinent part:

> There is imposed upon all public utilities subject to the jurisdiction of the Public Service Commission of Utah, a special fee in addition to any charge now assessed, levied and required by law, for the purpose of

> requiring from said public utilities the defraying of the cost of their regulation. Said fee shall be fixed and determined by the executive director of the Department of Business Regulation, subject to audit by the state auditor on or before May fifteenth of each year upon said utilities as a uniform percentage of the gross operating revenue of each of said utilities for the preceding calendar year derived from its public utility business and operations during said period within this state, excluding income derived from interstate business . . .. It is the purpose and intent of this Act that the public utility shall provide all of the funds for the administration, support, and maintenance of the Public Service Commission and state agencies within the Department of Business Regulation involved in the regulation of public utilities, including expenditures by the Attorney General for utility regulation, and that part of the Department of Transportation's responsibilities relating to carrier safety.

24. As noted in the foregoing provision, the Public Service Commission does not set the regulation fee. Rather, the fee is fixed and determined by the executive director of the Department of Business Regulation, subject to audit by the State Auditor. The Utah State Tax Commission collects the fee. Utah Code Ann. § 54-5-5. Significant penalties may be imposed for failure to pay it. See Utah Code Ann. § 54-5-3 and § 54-5-4.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That:

1. Entities which qualify as telephone corporations and which take steps to provide the Utah intrastate telecommunications service to the public generally, in return for

compensation, are public utilities and must obtain a certificate of public convenience and necessity prior to commencing operation in Utah. In the event a qualifying entity has begun operation already, that entity must make application for a certificate of public convenience and necessity within one month of the date of this Order. They become subject to the requirement of laws applicable to public utilities, including the payment of the regulatory fee.

2. Until a rule-making procedure is concluded to establish formal reseller filing and operating requirements, WATS resellers shall be issued a certificate of convenience and necessity upon an administrative determination of fitness to serve based upon an application which shall include:

(1) The name and address of the applicant, its officers or principals.

(2) A description of the operation proposed to be performed.

(3) If the applicant is a corporation, a copy of its Articles of Incorporation.

(4) A statement showing the financial condition of the applicant.

(5) The manner in which it is proposed to finance the operation, and details of loans incidental to the capitalization of the operation.

(6) A statement of the terms and conditions of service it proposes to offer to the public.

3. WATS resellers, upon certification, shall comply with the terms of Utah Code Ann., Section 54-4-25 by filing an advice letter with the Commission.

4. Specialized Common Carriers such as SPCC and MCI are public utilities under the laws of the State of Utah and subject to the regulation of this Commission to the extent that they provide intrastate telecommunications services to their customers, either directly or indirectly. So long as such carriers hold themselves out within the State of Utah as providing only interstate service, and so long as the number of intrastate calls completed through their networks is insignificant, they will not be required to apply for certificates of convenience and necessity nor to file tariffs with this Commission, nor be subject to the regulatory fee.

5. All Specialized Common Carriers providing interstate MTS service, whose customers make any calls originating and terminating within the State of Utah, shall provide to this Commission annually, within forty-five (45) days following the end of each calendar year, a sworn statement setting forth the number and exact percentage of such calls to the total calls made by its customers in the State of Utah.

6. Within one hundred twenty (120) days from the date of this Order, the Specialized Common Carriers who are parties to this proceeding, Mountain Bell, Continental and the Division shall submit to this Commission a full report with respect to the

feasibility and timetable with respect to the availability of equipment which would permit Specialized Common Carriers engaged in interstate telecommunications service to block or otherwise prohibit their customers from making intrastate calls. Following the receipt of this report, which the Commission desires to be a joint effort of the parties involved, the Commission will then determine whether or not an evidentiary hearing is necessary to consider the desirability of modifying the provisions of this Order.

7. Since the intrastate WATS tariffs of Mountain Bell and Continental, at the time of the hearing in these cases, do not permit the resale of intrastate WATS services, said parties are ordered to file with the Commission within sixty (60) days of the date of this Order, if they have not done so, tariffs which would provide for such resale.

8. The Commission reserves the right to modify the provisions of this Order at any time, either upon its own motion, or at the request of any interested party.

9. The question of whether or not hotels, motels and similar businesses who provide for the resale of intrastate MTS service are public utilities and the extent to which the Commission should regulate the same will be considered under a separate docket number.

DATED at Salt Lake City, Utah, this 14th day of April, 1983.

/s/ Brent H. Cameron, Chairman

(SEAL)

/s/ David R. Irvine, Commissioner

/s/ James M. Byrne, Commissioner

Attest:

/s/ Jean Mowrey, Secretary

EXHIBIT C

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of the MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY for Approval of an Increase in Rates and Associated Tariff Revisions.	CASE NO. 85-049-02 REPORT AND ORDER

ISSUED: December 31, 1985

APPEARANCES:

Ted D. Smith David E. Salisbury	For	Mountain States Telephone and Telegraph Company
Michael Ginsberg Assistant Attorney General	"	Division of Public Utilities, Department of Business Regulation, State of Utah
Brian Burnett Assistant Attorney General	"	Committee of Consumer Services, Department of Business Regulation, State of Utah
Terry Kolp Bruce Able	"	Department of Defense, Federal Executive Agencies
Michael Smith Assistant Attorney General	"	Utah State University, University of Utah, Weber State College, Department of Administration Services
Gregory Williams Wendy Faber	"	Iomega Corporation, Utah Telephone Management Assoc.

By the Commission:

The application of the Mountain States Telephone and Telegraph Company (Mountain Bell, Company or Applicant) was filed on March 8, 1985, seeking an order of this Commission authorizing it to place into effect tariffs, rates and charges which would produce additional revenues of $48,461,000. Of that amount,

approximately $27 million (later revised to $25 million) is required to cover new depreciation rates, amortization of the depreciation reserve deficiency, and shortened amortization of embedded inside wire, all of which are mandated by the FCC and are beyond the discretion of the Public Service Commission.

Following a prehearing conference, the Commission issued its June 26, 1985 Report and Order on Interim Rates and Notice of further Hearings in connection with this case. Mountain Bell was denied any interim rate increase. Mountain Bell originally prefiled the testimony of Mr. Redding, Mr. Lawrence, Mr. Fox, Mr. Schelke, and Mr. Tanner. Mr. Redding filed additional testimony in August and October, 1985, showing the actual revenue received by the Company during the 1985 test year.

In its Order of June 27, 1985 (Procedural Order) the Commission established dates for Mountain Bell to file its proposed tariff adjustments and for hearings with respect thereto. Discovery was conducted by the parties and additional prefiled testimony was submitted by the Applicant and other parties of record. Hearings commenced on October 21, 1985 and continued through November 15, 1985.

I. POSITION OF THE PARTIES

Mountain Bell presented the direct prefiled testimony of Mr. Redding, Mr. Lawrence, Mr. Fox, Mr. Shelke, Mr. Unruh, Dr. Petersen, Dr. Oveson, Mr. Dwyer, Mr. Elder, Mr. Miner, and Mr. Tanner. In addition to the prefiled testimony, Mountain Bell

during the test year, however, the Company booked only that for April and May. Therefore, Ms. Bright recommended a $153,000 reduction in test-year expenses. This amount is 7/9 of the $196,000 total expense. Mountain Bell made this correction in their October filing, according to Mr. Redding.

9. SHAREHOLDERS ASSOCIATION DUES AND POLITICAL ACTION COMMITTEE EXPENSES

Mr. Henningsen, witness for the Division, contended that Mountain Bell included in its application $36,000 which had been paid to the Utah Utility Shareholders Association and to political action committees. Mr. Henningsen stated that these payments obviously benefit shareholders and, therefore, should not be recovered from ratepayers. Mountain Bell witness Redding agreed that these items should be removed from test-year expenses. The Company's October 1985 filing reflected this adjustment.

10. ACCESS CHARGE REVENUE

Mr. Henningsen recommended that the revenues which Mountain Bell will realize from the recently approved access tariff (see Commission Order in Case No. 83-999-11, October 29, 1985) should be considered in determining revenue requirement in the present case. The Company agreed with the recommended adjustment in the amount of a $2.325 million reduction in requested revenue requirement.

11. UNAMORTIZED ACCUMULATED INVESTMENT TAX CREDIT

The Division proposed an adjustment to revenue requirement to correct a "divestiture-caused inequity" relating to

AT&T COST SAVINGS

As a result of AT&T resuming its own billing inquiry function there will be a savings to the Company. Accordingly, an adjustment of $273,000 was proposed by the Committee, recommended by the Division, and accepted by the Company. The Commission finds that the adjustment should be approved.

8. MANAGEMENT INCENTIVE OPTION PLAN (MIOP)

The Company included all of the cost of MIOP but had only reflected its savings to the extent that actual results were included in its filing. An adjustment was proposed which reflects the inclusion of the full year's savings. The adjustment, proposed by the Committee and accepted by the Company reduces revenue requirement by $153,000. The Commission finds that it should be adopted.

9. SHAREHOLDER ASSOCIATION DUES AND POLITICAL ACTION COMMITTEE EXPENSE

The Company included in its filing its test-year costs for Shareholders Association dues and Political Action Committee expense. These costs benefit the shareholders of the Company and support their lobbying efforts. The Division proposed an adjustment of $36,000 which was accepted by the Company. The Commission finds that these costs of shareholder and political efforts should not be charged to the ratepayer, and that the adjustment should be adopted.

10. ACCESS CHARGE REVENUES

The Commission issued its Report and Order in Case No. 83-999-11, Access Charges, during this rate case. The Division

proposed an adjustment to revenue requirement of $2,325,000 in order to account for additional revenue from access tariffs. The Company accepted the adjustment. The Commission finds that the adjustment should be adopted.

11. ACCUMULATED DEFERRED INVESTMENT TAX CREDIT

The crux of the Division's argument in favor of its proposed adjustment is its definition of "ratable period" as the period assets are on Mountain Bell's books. In support, the Division cites a Congressional Committee report and offers its judgment that Congress intended an equitable sharing of ITC benefits. On this basis, the termination of ITC flow-back upon the transfer of Mountain Bell's assets to AT&T has produced an inequitable result which can be corrected by the proposed $5.18 million adjustment to revenue requirement in this case. The Company argues that FCC and court decisions and IRS rulings establish the ratable period as the useful life of the asset and also make clear that efforts to reduce cost of service by flowing-back ITC benefits more rapidly than this will jeopardize its ability to claim the ITC in all open tax years.

We find the following:

In the year that the ITC is taken, the taxes of the Company are reduced. Because state regulatory agencies are not allowed to reduce cost of service by the full amount of the credit, rates will be based on cost of service as if the credit had not been taken. The cash flow thus created for the Company is to be used to fund investment. The funds in question come from ratepayers whether used by the Company for investment or to

APPENDIX "A"
MOUNTAIN BELL CASE NO. 85- 47-01
SUMMARY OF REVENUE EFFECT
BASED ON 3-16-85 FILING
($000)

ISSUE	FINAL
MTN BELL 8-16 REQ (CORRECTED)	50,331
BILLING INQUIRY COST CONTACT	(4,018)
MANAGEMENT BONUSES	(977)
BUDGET BONUS MGMT LUMP-SUM PMT	(1,648)
ANTITRUST COSTS	(1,384)
BELLCORE EXPENSES	
BUDGET TO ACTUAL	(132)
NSEP	0
IMAGE ENHANCEMENTS	2)
800 SERVICE	(72)
ISDN	23)
EQUAL ACCESS	(174)
APPLIED RESEARCH	(77)
QUALITY ASSURANCE	0
DIRECTORY ADVERTISING	(1,990)
AT&T COST SAVINGS	(273)
MIOP	(153)
SHAREHOLDER ASS DUES FAC EXP	(36)
ACCESS CHARGE REVENUES	(2,325)
DEFERRED ITC	0
EQUAL ACCESS COSTS	1,975)
CASH WORKING CAPITAL/LEAD-LAG)	(1,041)
INTEREST SYNCHRONIZATION	(1,320)
ANNUALIZATION OF WAGE INCREASE	0
MIPP/SIPP	0
CAPITAL STRUCTURE CHANGES	0
ZERO COST ITEMS TO RATEBASE	0
MATERIALS AND SUPPLIES	0
CORRECT CUSTOMER CONTACT ADJ	0
SNFA EXPENSE	0
RATE OF RETURN	
PERCENT	14.2%
AMOUNT	(19,336
TOTAL ADJUSTMENTS	28,120)
NET RECOMMENDATION	22,211